Supreme Court, U.S.
FILED

No. 00-279 AUG 21 2000

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

ARCHDIOCESE OF OKLAHOMA CITY;
REVEREND CHARLES A. SALATKA;
REVEREND EUSEBIUS J. BELTRAN, and
ORDER OF PREVENTIAL OBLATES OF
ST. FRANCIS DE SALES,

Petitioners,

v.

DENNIS W. BALLARD and RONALD BALLARD,
individually; and ALGERENE BALLARD,
individually; C.J., a minor, by and through his parents
and next of friends, JIMMIE BARTLETT JOHNSON, JR.
and PAMELA GAYLE JOHNSON; and
JIMMIE BARTLETT JOHNSON, JR., individually;
and PAMELA GAYLE JOHNSON, individually,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF OKLAHOMA

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

[SEAL]

DISTRICT COURT
SEVENTH JUDICIAL DISTRICT,
STATE OF OKLAHOMA
Oklahoma County Courthouse
321 Park Ave., Room 315
Oklahoma City, Okla. 73102
E-MAIL JACKSONN@OSCN.NET

NILES JACKSON
DISTRICT JUDGE

TELEPHONE: (405) 713-1156
FAX: (405) 713-1852

May 15, 2000

TO: Counsel of Record

RE: CJ vs. Rapp et al - CJ-99-6829
Ballard vs. Rapp et al - CJ-99-6364

Dear Counsel,

1.) **Defendants' Motions to Strike: Sustained.** A motion to dismiss must be decided on the law, not the evidence. Although the court could view the attachments as an effort to transform this action into a Motion for Summary Judgment, it views the effort as premature at this time, pending adequate discovery.

2.) **Defendants' Motions to Dismiss: Denied.** N.H. vs. Presbyterian Church, 1999 OK 88, at section B of the opinion, clearly allows an employer to be sued if proper knowledge is alleged, as it is alleged in this case.

Plaintiffs shall prepare the Journal Entry.

Ordered this 15th day of May, 2000

Sincerely,

/s/ Niles Jackson
NILES JACKSON
DISTRICT JUDGE

[Certificate of Service Omitted in Printing]

APPENDIX B

[Filed JUL 10 2000]

IN THE SUPREME COURT OF
THE STATE OF OKLAHOMA

Monday, July 10, 2000

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS OF THE COURT:

* * *

94,730 John Doe, individually; Oblates of St. Francis de Sales et al. v. Honorable Niles Jackson, Judge of the District Court of Oklahoma County, Seventh Judicial District, Oklahoma.
Application to assume original jurisdiction is denied.
CONCUR: Summers, C.J., Hargrave, V.C.J., Hodges, Lavender, Kauger, Watt. Boudreau, Winchester, J.J.

* * *

94,743 Oblates of St. Francis de Sales v. Honorable Niles Jackson, Judge of the District Court of Oklahoma County, Seventh Judicial District, Oklahoma et al.
Application to assume original jurisdiction is denied.
CONCUR: Summers, C.J., Hargrave, V.C.J., Hodges, Lavender, Kauger, Watt, Boudreau, Winchester, JJ.

/s/ Hardy Summers
CHIEF JUSTICE

APPENDIX C

[Filed JAN 25 2000]

IN THE DISTRICT COURT
WITHIN AND FOR OKLAHOMA COUNTY,
STATE OF OKLAHOMA

Case No. CJ-99-6364-65

DENNIS W. BALLARD and RONALD BALLARD, individually and ALGERENE BALLARD, individually,

Plaintiffs,

vs.

JAMES FRANCIS RAPP, individually, OBLATES OF ST. FRANCIS deSALES, ARCHDIOCESE OF OKLAHOMA CITY, REVERAND CHARLES A. SALATKA, REVEREND EUSEBIUS J. BELTRAN, and REVERAND ALFERD J. RUSSELL,

Defendants.

FOURTH AMENDED PETITION

COMES NOW, the Plaintiffs, DENNIS W. BALLARD and RONALD BALLARD, individually and ALGERENE BALLARD, individually (herein "Plaintiffs") and for actions against Defendants, allege and state as follows:

COUNT I

1. Plaintiffs are residents of Stephens County, and the acts complained of herein occurred in Stephens County.

2. Defendants, ARCHDIOCESE OF OKLAHOMA CITY (hereafter "ARCHDIOCESE"), is an Oklahoma religious corporation and/or religious organizational association, with facilities located in Oklahoma County, and subject to the jurisdiction and venue of this Court.

3. Defendant Rev. Charles A. Salatka (hereinafter "SALATKA") is a resident of Oklahoma County, Oklahoma.

4. Defendant Rev. Eusebius J. Beltran (hereinafter "BELTRAN") is a resident of Oklahoma County, Oklahoma.

5. Defendant Rev. Alferd J. Russell (hereinafter "RUSSELL") is a member of the Oblates of St. Francis de Sales whose last known address was P.O. Box 4683, 2460 Parkwood Avenue, Toledo, Ohio.

6. Defendant OBLATES OF ST. FRANCIS de SALES (hereafter "OBLATES") is a religious organization and order and/or religious corporation of the State of Ohio having an employee and/or agent in the State of Oklahoma and thus, is subject to the jurisdiction and venue of this Court.

7. Defendant, JAMES FRANCIS RAPP (hereafter "RAPP"), is a resident of Stephens County, Oklahoma, and employee and/or agent of ARCHDIOCESE and the OBLATES and is subject to the jurisdiction and venue of this Court.

8. Service upon the ARCHDIOCESE can be accomplished through their service agent in Oklahoma, The Secretary of State, State of Oklahoma, pursuant to 18 O.S. 1991 §552.15 or through their

corporate officer, pursuant to 12 O.S. §2004(c), at the Catholic Pastoral Center, 7501 N.W. Expressway, Oklahoma City, Oklahoma.

9. The ARCHDIOCESE knowingly had in its employ JAMES FRANCIS RAPP, who at all times pertinent hereto was acting as the agent, servant or employee of Defendants.

10. That RUSSELL at all times pertinent hereto was a member of the Order of the Oblates of St. Francis de Sales.

11. That RUSSELL was principal of Lumen Christi High School in Jackson, Michigan during the years 1984 and 1985 and as such, was made aware of the sexual misconduct of James Francis Rapp who was on the staff of the Lumen Christi High School.

12. That RUSSELL was the Provincial of the Toledo-Detroit Provence of the Oblates in 1987 and notified RAPP of his new assignment upon RAPP's release from the House of Affirmation while have knowledge of RAPP's prior sexual misconduct.

13. That RUSSELL was the Provincial at the time RAPP was seeking assignment to Assumption Catholic Church and was privy to correspondence between Archbishop Salatka and James Francis Rapp and further that RUSSELL with the concurrence of the Provincial Council approved the transfer of James Francis Rapp to Assumption Catholic Church.

14. That SALATKA was the Archibshop of the Archdiocese of Oklahoma City in 1990 and 1991.

15. That SALATKA was personally involved in the assignment of James Francis Rapp from the Dio-

cese of Joliet to Assumption Catholic Church in Duncan, Oklahoma.

16. That SALATKA was responsible for the formal installation of RAPP as Pastor of Assumption Parish even though the Diocese had been made aware of the alleged sexual misconduct of RAPP and his commitment to the House of Affirmation for treatment.

17. That BELTRAN is the Archbishop of Oklahoma City and current has nominal ownership of property belonging to the Archdiocese of Oklahoma City or holds property in trust for the Body Corporate of the Archdiocese of Oklahoma City.

18. That BELTRAN was the Archbishop of the Diocese at a time when the acts alleged herein were committed by RAPP and that BELTRAN knew of RAPP's sexual propensities and failed to notify the public, notify the parishioners of Assumption Parish, put in place guidelines to supervise RAPP or failed to enforce guidelines which would have protected the Plaintiff DENNIS BALLARD.

19. At all times pertinent to this action, RAPP was a member of the Oblates of St. Francis de Sales, a religious order, organization and/or religious corporation, which assigned RAPP to and placed him in the employ of ARCHDIOCESE by contract. Further, that at all times pertinent to this action, RAPP had taken a vow of obedience to his supervisors in the OBLATES and to the Catholic Church and had done this at a time when the OBLATES was his sole employer.

20. The OBLATES and RUSSELL had knowledge, express or implied, of RAPP's history of illegal

and immoral sexual activity and with the express knowledge that he was an ephebophilia, and notwithstanding this knowledge assigned RAPP to the employ of Defendant, ARCHDIOCESE.

21. THE OBLATES and ARCHDIOCESE had knowledge or should have known of the illegal sexual propensities of RAPP when RAPP became an employee and was installed as Pastor to Assumption Catholic Church of Duncan, Oklahoma.

22. That neither the OBLATES or ARCHDIOCESE, although having express or implied notice or knowledge of the sexual propensities of RAPP advisied the parishioners of Assumption Catholic Church of the sexual propensities of RAPP.

23. Plaintiffs Ronald Ballard and Algerene Ballard herein relied on RAPP as a religious person and "a man of the cloth" to provide religious training, counseling and guidance, not only to themselves but to their then minor child and Plaintiff Dennis Ballard.

24. The Oblates of St. Francis de Sales, the Archdiocese of Oklahoma City, RUSSELL SALATKA and BELTRAN had a duty to protect the Plaintiff, DENNIS W. BALLARD, from known sex offenders.

25. Oblates of St. Francis de Sales, the Archdiocese of Oklahoma City, SALATKA and BELTRAN had a duty to adequately screen RAPP as its potential employee had a duty to supervise RAPP as an employee and known sex offender.

26. JAMES FRANCIS RAPP taking advantage of the positions of trust placed in him by the Plaintiffs herein, on a continuing basis sexually molested

the minor child of the parties Ronald Ballard and Algerene Ballard and did molest Dennis Ballard and did so on a number of occasions.

27. From approximately 1992 through 1997, JAMES FRANCIS RAPP molested Dennis Ballard on a continuing basis.

28. The acts of the Defendant, RAPP, were extreme and outragenous and his conduct transcended all bounds of decency tolerated by a civilized community. The acts were immoral and illegal and were the proximate cause of personal injuries, pain and suffering, and mental and emotional distress suffered by DENNIS W. BALLARD. As a result thereof, medical and psychological care has been required which has been paid and will be paid by RONALD and ALGERENE BALLARD for which said Plaintiffs, RONALD and ALGERENE BALLARD have been damaged as a result of the loss of services of the Plaintiff, DENNIS W. BALLARD, and have suffered consequential damages in the nature of the medical treatment cost and counseling costs incurred on behalf of DENNIS W. BALLARD.

29. From the acts of the Defendants, Plaintiffs have been damaged in excess of $10,000.00 each.

COUNT II

30. All allegations in the first count are incorporated herein as if fully set forth.

31. The Defendants and all of them became aware of the incidents complained of herein and failed or refused to properly report this and other incidents as required by 21 O.S. §846.

32. From the acts of the Defendants, Plaintiff, DENNIS W. BALLARD, has been damaged in excess of $10,000.00 each.

COUNT III

33. All allegations in the first and second counts are incorporated herein as if fully set forth.

34. The Defendants, OBLATES, ARCHDIOCESE, SALATKAS, BELTRAN have shown a callous disregard for the rights of the Plaintiff, DENNIS W. BALLARD, in negligently hiring, retaining and failing to supervise said JAMES FRANCIS RAPP. Defendants' conduct is outrageous and grossly negligent and the proximate cause for damages suffered by Plaintiff, DENNIS W. BALLARD.

35. From the acts of all of the Defendants, Plaintiff, DENNIS W. BALLARD, has been damaged in excess of $10,000.00 by each Defendant.

COUNT IV.

36. All allegations in the first, second and third counts are incorporated herein as if fully set forth.

37. The Defendants, OBLATES, ARCHDIOCESE, SALATKAS, BELTRAN, RUSSELL have shown a callous disregard for the rights of the Plaintiff in knowingly withholding information regarding RAPP'S sexual propensities and have displayed outragenous and grossly negligent conduct in disregard for Plaintiff's rights by their failure to warn all parishioners and Plaintiff specifically of RAPP'S sexual propensities and as a result, these

actions are the proximate cause of the damage to DENNIS W. BALLARD.

38. From the acts of the Defendants, Plaintiff, DENNIS W. BALLARD, has been damaged in excess of $10,000.00 by each of the Defendants.

COUNT V

39. All allegations in the first, second, third and fourth counts are incorporated herein as if fully set forth.

40. The Defendants, OBLATES, ARCHDIOCESE, RUSSELL and BELTRAN, have shown a callous, intentional and reckless disregard for the Plaintiff by willfully allowing RAPP to continue in his position of trust once notified that the molestation of a minor was occurring or had occurred.

41. From the acts of the Defendants, Plaintiff, DENNIS W. BALLARD, has been damaged in excess of $10,000.00 by each of the Defendants.

COUNT VI

42. All allegations in the first, second, third, fourth and fifth counts are incorporated herein as if fully set forth.

43. The acts of all Defendants which were intentional and/or reckless proximately caused the Plaintiff severe emotional distress for which he is entitled to recover damages.

44. From the acts of the Defendants, Plaintiff, DENNIS W. BALLARD, has been damaged in excess of $10,000.00 by each of the Defendants.

COUNT VII

45. All allegations in the first, second, third, fourth, fifth and sixth counts are incorporated herein as fully set forth.

46. The acts materially interfered with the Plaintiff, DENNIS W. BALLARD'S religious faith and directly caused his loss of self esteem.

47. From the acts of the Defendants, Plaintiff, DENNIS W. BALLARD, has been damaged in excess of $10,000.00 by each of the Defendants.

WHEREFORE, Plaintiffs demand judgment against the Defendants for personal injuries, pain and suffering, medical expenses, mental and emotional distress in excess of $10,000.00 together with interest and costs, punitive and/or exemplary damages in excess of $10,000.00 and all other relief as this Court might deem appropriate.

STUART, FRIEDA & HAMMOND, P.C.

By: /s/ James M. Frieda
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APPENDIX D

[Filed JAN 25 2000]

IN THE DISTRICT COURT
WITHIN AND FOR OKLAHOMA COUNTY,
STATE OF OKLAHOMA

Case No. CJ-99-6829-65

C.J., a minor, by and through his parents and next of friends, JIMMIE BARTLETT JOHNSON, JR. and PAMELA GAYLE JOHNSON and JIMMIE BARTLETT JOHNSON, JR., individually and PAMELA GAYLE JOHNSON, individually,

Plaintiffs,

vs.

JAMES FRANCIS RAPP, individually, OBLATES OF ST. FRANCIS de SALES, ARCHDIOCESE OF OKLAHOMA CITY, REVERAND CHARLES A. SALATKA, REVERAND EUSEBIUS J. BELTRAN, and REVERAND ALFERD J. RUSSELL,

Defendants.

THIRD AMENDED PETITION

COMES NOW, the Plaintiffs, C.J. a minor, by and through his parents and next of friends, JIMMIE BARTLETT JOHNSON, JR., and PAMELA GAYLE JOHNSON, and JIMMIE BARTLETT JOHNSON, JR. individually and PAMELA GAYLE JOHNSON, individually (herein

"Plaintiffs") and for actions against Defendants, allege and state as follows:

COUNT I

1. Plaintiffs are residents of Stephens County, and the acts complained of herein occurred in Stephens County.

2. Defendants, ARCHDIOCESE OF OKLAHOMA CITY (hereafter "ARCHDIOCESE"), is an Oklahome religious corporation and/or religious organizational association, with facilities located in Oklahome County, and subject to the jurisdiction and venue of this Court.

3. Defendant Rev. Charles A. Salatka (hereinafter "SALATKA") is a resident of Oklahoma County, Oklahoma.

4. Defendant Rev. Eusebius J. Beltran (hereinafter "BELTRAN") is a resident of Oklahoma County, Oklahoma.

5. Defendant Rev. Alferd J. Russell (hereinafter "RUSSELL") is a member of the Oblates of St. Francis de Sales whose last known address was P.O. Box 4683, 2460 Parkwood Avenue, Toledo, Ohio.

6. Defendant OBLATES OF ST. FRANCIS de SALES (hereafter "OBLATES") is a religious organization and order and/or religious corporation of the State of Ohio, having an employee and/or agent in the State of Oklahoma and thus, is subject to the jurisdiction and venue of this Court.

7. Defendant, JAMES FRANCIS RAPP (hereafter "RAPP"), is a resident of Stephens County, Okla-

homa, and employee and/or agent of ARCHDIOCESE and the OBLATES and is subject to the jurisdiction and venue of this Court.

8. Service upon the ARCHDIOCESE can be accomplished through their service agent in Oklahoma. The Secretary of State, State of Oklahoma, pursuant to 18 O.S. 1991 §552.15 or through their corporate officer, pursuant to 12 O.S. §2004(c), at the Catholic Pastoral Center, 7501 N.W. Expressway, Oklahoma City, Oklahoma.

9. The ARCHDIOCESE knowingly had in its employ JAMES FRANCIS RAPP, at all times who was acting as the agent, servant or employee of Defendants.

10. That RUSSELL at all times pertinent hereto was a member of the Order of the Oblates of St. Francis de Sales.

11. That RUSSELL was principal of Lumen Christi High School in Jackson, Michigan during the years 1984 and 1985 and as-such, was made aware of the sexual misconduct of James Francis Rapp who was on the staff of the Lumen Christi High School.

12. That RUSSELL was the Provincial of the Toledo-Detroit Provence in 1987 and notified RAPP of his new assignment upon RAPP's release from the House of Affirmation while have knowledge of RAPP's prior sexual misconduct.

13. That RUSSELL was the Provincial at the time RAPP was seeking assignment to Assumption Catholic Church and was privy to correspondence between Archbishop Salatka and James Francis Rapp and further that RUSSELL with the concurrence of the Provincial Council approved the transfer of James Francis Rapp to Assumption Catholic Church.

14. That SALATKA was the Archbishop of the Archdiocese of Oklahoma City in 1990 and 1991.

15. That SALATKA was personally involved in the assignment of James Francis Rapp from the Diocese of Joliet to Assumption Catholic Church in Duncan, Oklahoma.

16. That SALATKA was responsible for the formal installation of RAPP as Pastor of Assumption Parish even though the Diocese had been made aware of the alleged sexual misconduct of RAPP and his commitment to the House of Affirmation for treatment.

17. That BELTRAN is the Archbishop of Oklahoma City and is currently the nominal owner of property belonging to the Archdiocese of Oklahoma City or holds property in trust for the Body Corporate of the Archdiocese.

18. That BELTRAN was the Archbishop of the Diocese at a time when the acts alleged herein were committed by RAPP and that BELTRAN knew of RAPP's sexual propensities and failed to notify the public, put in place guidelines to supervise RAPP or failed to enforce guidelines which would have protected the Plaintiff C.J.

19. At all times pertinent to this action, RAPP was a member of the Oblates of St. Francis de Sales, a religious order, organization and/or religious corporation, which assigned RAPP to and placed him in the employ of ARCHDIOCESE by contract. Further, that at all times pertinent to this action, RAPP had taken a vow of obedience to his supervisors in the OBLATES and to the Catholic Church at a time when the OBLATES was his sole employer.

20. The OBLATES and RUSSELL had knowledge, express or implied, of RAPP's history of illegal and immoral sexual activity and with the express knowledge that he was a ephebophilia, and notwithstanding this knowledge assigned RAPP to the employ of Defendant, ARCHDIOCESE.

21. THE OBLATES, ARCHDIOCESE, RUSSELL AND SALATKA had knowledge or should have known of the illegal sexual propensities of RAPP when RAPP became an employee and was installed as Pastor of Assumption Catholic Church of Duncan, Oklahoma.

22. That neither the OBLATES, ARCHDIOCESE, RUSSELL, BELTRAN or SALATKA although having express or implied notice or knowledge of the sexual propensities of RAPP advised the parishioners of Assumption Catholic Church, or residents of Duncan of the sexual propensities of RAPP.

23. Plaintiffs herein relied on RAPP as a prominent religious person in the community and "a man of the cloth" to provide counseling and guidance to their minor child.

24. JAMES FRANCIS RAPP taking advantage of the positions of trust placed in him by the Plaintiffs herein, did sexually molest the minor prior to the minor's 16th birthday.

25. The OBLATES, ARCHIDIOCESE, RUSSELL, SALATKA and BELTRAN had a duty to adequately screen its employees.

26. That Defendants, OBLATES, ARCHDIOCESE, SALATKA, BELTRAN and RUSSELL had a duty to supervise RAPP and make the community of Duncan aware of the prior sexual activity of RAPP.

27. The acts of the Defendant, RAPP, were extreme and outrageous and his conduct transcended all bounds of decency tolerated by a civilized community. The acts were immoral and illegal and were the proximate cause of personal injuries, pain and suffering, and mental and emotional distress suffered by C.J. As a result thereof, medical and psychological care has been required which has been paid and will be paid by JIMMIE and PAMELA JOHNSON for which said Plaintiffs, JIMMIE and PAMELA JOHNSON have been damaged as a result of the loss of services of the Plaintiff, C.J., and have suffered consequential damages in the nature of the medical treatment cost and counseling costs incurred on behalf of C.J.

28. From the acts of the Defendants, Plaintiffs have been damaged in excess of $10,000.00 each.

COUNT II

29. All allegations in the first count are incorporated herein as if fully set forth.

30. The Defendants and all of them became aware of the incidents complained of herein and failed or refused to properly report this and other incidents as required by 21 O.S. §846.

31. From the acts of the Defendants, Plaintiffs have been damaged in excess of $10,000.00 each.

COUNT III

32. All allegations in the first and second counts are incorporated herein as if fully set forth.

33. The Defendants, OBLATES, ARCHDIOCESE, SALATKA, BELTRAN and RUSSELL have shown a

callous disregard for the rights of the Plaintiff, C.J., in negligently hiring, retaining and failing to supervise said JAMES FRANCIS RAPP. Defendants' conduct is outragenous and grossly negligent and the proximate cause for damages suffered by the Plaintiff, C.J.

34. From the acts of the Defendants, Plaintiff, C.J., have been damaged in excess of $10,000.00 by each Defendant.

COUNT IV

35. All allegations in the first, second and third counts are incorporated herein as if fully set forth.

36. The Defendants, OBLATES, ARCHDIOCESE, SALATKA, BELTRAN and RUSSELL have shown a callous disregard for the rights of the Plaintiffs, C.J., in knowingly withholding information regarding RAPP'S sexual propensities and have displayed outrageous and grossly negligent conduct in disregard of Plaintiffs' rights by their failure to warn all young people exposed to RAPP and Plaintiffs specifically of RAPP'S sexual propensities. That Defendants failed to notify members of the community of which Plaintiffs did reside.

37. From the acts of the Defendants, Plaintiff, C.J. have been damaged in excess of $10,000.00 by each Defendant.

COUNT V

38. All alegations in the first, second, third and fourth counts are incorporated herein as if fully set forth.

39. The Defendants, OBLATES, ARCHDIOCESE, SALATKA, BELTRAN and RUSSELL, have shown a

callous, intentional and reckless disregard for the Plaintiff, C.J., by willfully allowing RAPP to continue in his position of trust once notified that the molestation of a minor, other than the Plaintiff, was occurring.

40. From the acts of the Defendants, Plaintiff, C.J., has been damaged in excess of $10,000.00 by each Defendant.

COUNT VI

41. All allegations in the first, second, third, fourth and the fifth counts are incorporated herein as if fully set forth.

42. The acts of all Defendants which were intentional and/or reckless proximately caused the Plaintiff, C.J., severe emotional distress for which he is entitled to recover damages.

43. From the acts of the Defendants, Plaintiff, C.J., has been damaged in excess of $10,000.00 by each Defendant.

COUNT VII

44. All allegations in the first, second, third, fourth, fifth and sixth counts are incorporated herein as fully set forth.

45. The acts materially interfered with the Plaintiff, C.J., and directly caused severe loss of self esteem.

46. From the acts of the Defendants, Plaintiff, C.J., has been damaged in excess of $10,000.00 by each of the Defendants.

WHEREFORE, Plaintiffs demand judgment against the Defendants for personal injuries, pain and suffering,

medical expenses, mental and emotional distress in excess of $10,000.00 together with interests and costs, punitive and/or exemplary damages in excess of $10,-000.00 and all other relief as this Court might deem appropriate.

STUART, FRIEDA & HAMMOND, P.C.

By: /s/ James M. Frieda
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ATTORNEYS FOR PLAINTIFFS

ATTORNEY'S LIEN CLAIMED!

[Certificate of Service Omitted in Printing]

APPENDIX E

[Filed FEB 18 2000]

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

No. CJ-99-6364-65

DENNIS W. BALLARD and RONALD BALLARD, individually; and ALGERENE BALLARD, individually,

Plaintiffs,

vs.

JAMES FRANCIS RAPP, individually; OBLATES OF ST. FRANCIS deSALES; ARCHDIOCESE OF OKLAHOMA CITY; REVERAND CHARLES A. SALATKA; REVEREND EUSEBIUS J. BELTRAN; and REVEREND ALFERD J. RUSSELL,

Defendants.

DEFENDANTS' ARCHDIOCESE OF OKLAHOMA CITY, REVEREND CHARLES A. SALATKA AND REVEREND EUSEBIUS J. BALTRAN'S, SPECIAL APPEARANCE AND MOTION TO DISMISS ON GROUNDS OF SUBJECT MATTER JURISDICTION AND PLAINTIFFS' FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

COME NOW Defendants, Archdiocese of Oklahoma City, Reverend Charles A. Salatka and Reverend Eusebius J. Beltran, pursuant to Title 12 O.S. §2012, move to

dismiss Plaintiffs' lawsuit on ground that this court lacks subject matter jurisdiction over these Defendants and that Plaintiffs have failed to state a claim upon which relief can be granted. In support of the Defendants' Motion to Dismiss, they would show the court the following legal arguments and authorities.

1. Plaintiffs have sued Defendants alleging that Dennis W. Ballard was sexually molested by one Father James Francis Rapp over a course of period of time alleged from approximately 1992 to 1997. (Plaintiffs' Fourth Amended Petition, attached hereto as Exhibit A, ¶ 27)

2. Plaintiffs further allege that Defendants, Archdiocese of Oklahoma City, Reverend Salatka and Reverend Beltran were negligent in the hiring, retention and failing to supervise James Rapp. (Plaintiffs' Fourth Amended Petition, attached as Exhibit A, ¶ 34). Plaintiffs further allege that these Defendants were callous and reckless in allowing Rapp to continue in his position of a priest once they received notification of the alleged molestation of Plaintiff. (Plaintiffs' Fourth Amended Petition, attached as Exhibit A, ¶ 40.) Defendants deny these allegations.

3. Nonetheless, a careful examination of the Plaintiffs' Fourth Amended Petition (a copy of which is attached hereto as Exhibit A), reveals that the crux of Plaintiffs' case againse these three Defendants has put at issue: Defendants' view of Father Rapp's ecclesiastical qualifications; how a religious organization evaluates the ecclesiastical performance of a priest; in what manner priests are to be supervised; and how priests go about their duties.

4. Essentially, Plaintiffs invite this court to impose and enforce a duty of employee supervision derived from a

secular perspective of agency principles. Defendants would respectfully submit to the court that the supervision of clergy members cannot be viewed in the eyes of the law in the same was as the supervision of common law employees. Indeed, for the court to accept jurisdiction in this case would be to enforce a model for church supervision and retention of a member of the clergy which, by simple definition, would constitute an excessive entanglement of the state with the church.

5. Any award of damages predicated on a religious organization's alleged negligent placement and supervision of a clergyman would create a chilling affect on the administration of religious organizations to make religious based decisions in the placement of clergymen.

PROPOSITION I

THE DOCTRINE OF SEPARATION OF CHURCH AND STATE AS GUARANTEED BY THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION BARS SUBJECT MATTER JURISDICTION IN THE INSTANT CASE.

A.

Plaintiffs' Lawsuit Violates The Separation of Church and State

The United States Supreme Court has said that under the First Amendment Free Exercise clause, the "essential characteristics of these [religious] liberties is, that under their shield, many types of life, character opinion and belief can develop unmolested and unobstructed." 12 *Cantwell v. State of Connecticut,* 310 U.S. 296, 310, 60 S.Ct. 900, 906, 84 L.Ed. 1213 (1940).

Thomas Jefferson's famous description of the essence of the First Amendment has now become standard doctrine in interpreting church state relations:

> "I contemplate with sovereign reverence that act of the whole American people which declared that their Legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and state."[1]

As will be shown, to allow this case to move forward could lead to indirect state supervision and review of the qualifications and placement of clergymen. This would certainly breach the wall of separation.

The United States Supreme Court has unequivocally banned judicial scrutiny of purely ecclesiastical decisions. *Watson v. Jones,* 80 U.S. [13 Wall.] 679, 727, 20 L.Ed. 666 [1872]. The trend of the Oklahoma Supreme Court has been to insolate religious organizations from the secular review of administrative actions. See *Guinn v. Church of Christ of Collinsville,* 775 P.2d 766, 772, n18 (Okla. 1989) (". . . We are of the opinion that a church's disciplinary decisions are protected from judicial scrutiny, whether the church is 'congregational' or hierarchical'".) *Hadnot v. Shaw,* 826 P.2d 978, 988 (Okla. 1992) ("When the target of civil litigation is simply the church's implementation of its valid ecclesastical judicature, the Free Exercise Clause of the First Amendment will afford a shield from interference by secular inquest").

"First Amendment values are plainly jeopardized when . . . litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice", *Presbyterian Church v. Hull Church,* 393 U.S.

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[1] Letter of Thomas Jefferson to the Danbury Baptist Association of January 1, 1801 (emphasis added) as cited in *Guinn v. Church of Christ of Collinsville,* 775 P.2d 766, 770 (Okla. 1989).

440, 449, 89 S.Ct. 801, 21 L.Ed.2d 658 (1969). The U.S. Supreme Court held, in the landmark case of *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), that: "As well as constituting an independent evil against the Religion Clauses were intended to protect, involvement or entanglement between government and religion serves as a warning signal. *Id.* U.S. 624-25; S.Ct. at 2117.

B.

A Negligent Hiring, Retaining and Supervision Cause of Action Requires Examination of Church Doctrine and Policies

The following is a collection of cases from various jurisdictions that have recognized the principle that the First Amendment bars the state from evaluating a religious organization's personal decisions and more specifically – how it supervised a member of the clergy in the context of a child molestation case. These cases recognize that for the court to assume jurisdiction over the matter would create excessive entanglement between the church and state and, thus, violate the First Amendment.

Schmidt v. Bishop, 779 F.Supp. 321 (S.D.N.Y. 1991) arose out of a claim that a minor was molested by a minister. Thus, the minor sued the National Presbyterian Church for the alleged negligent retention and placement and supervision of the minister. The words of the opinion capture the heart of Defendants', Archdiocese of Oklahoma City, Reverent Charles A. Salatka and Reverent Eusebius J. Beltran, defense in the instant case:

> "Furthermore, any inquiry into the policies and practices of the *church defendants in hiring or supervising their clergy* raises the same kind of First

Amendment problems of entanglement discussed above, which might involve the court – in making sensitive judgments about the propriety of the church defendants' supervision in light of their religious beliefs. Insofar as concerns, retention or supervision, the pastor of a Presbyterian church is not analogous to a common law employee. He may not demit his charge, not be removed by the session, without the consent of the Presbytery, functioning essentially as an ecclesiastical court. The traditional denominations each have their own intricate principles of governments, as to which the state has no rights of visitation. Church governance is founded in scripture, modified by reformers over almost to millenia. As the Supreme Court stated long ago before the *Lemon* formation was developed:

> 'It is not to be supposed that the judges of the civil courts can be as competent in the ecclesastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would, therefore, be an appeal from the more learned tribunal in the law which should decide the case to one which is less so. *Watson v. Jones,* 13 Wall. 679, 729, 20 L.Ed. 666 (1872). See also, *St. Nicholas Cathedral of Russian Orthodox Church of North America v. Kedroff,* 302 NY 1, 13, 96 N.E.2d 56 (1950) Rev'd. On other grounds, 344 U.S. 94 73 S.Ct. 143, 97 L.Ed. 120 (1952).'

It would, therefore, also be inappropriate and *unconstitutional* for this court to determine after the fact that the ecclesiastical authorities negligently supervised or retained the defendant bishop. Any award of damages would have a chilling affect leading indirectly to state control over the future conduct of affairs of a religious denomination, a

result violative of the text and history of the establishment clause." *Id.* at 332. (emphasis added)

In a lawsuit involving a Catholic archdiocese involving allegations of sexual molestation of a young boy, the court in *Ayon v. Gourley*, 47 F.Supp.2d 1246 (D. Colo. 1998), made the following holding:

> "The court finds that plaintiff's negligent hiring claim would violate both the free exercise and establishment clauses. Like the majority of cases cited, this court finds that consideration of the hiring policies of the archdiocese defendants would inevitably require examination of church policy and doctrine. The choice of individuals to serve as ministers is one of the most fundamental rights belonging to a religious institution. It is one of the most important exercises of a church's freedom from government control. For this court to insert itself into the process by which priests are chosen would substantially burden these defendants' free exercise of a crucial power to control the future of the church and, therefore, constitute interference with the practice of their religion.
>
> 'It would also cause excessive entanglement in church operations by fostering an appropriate government involvement. The application of even general tort law principles to church procedures on the choice of priests would require an inquiry into present practices with an intent to pass on their reasonableness. Such court examination and oversight of internal church policies would constitute an encroachment upon the church's religious functions." *Id.* at 1250

If the court accepted jurisdiction in this matter, it would put the court in the awkward position of evaluating the theological concepts of "grace" and "mercy".

"Beliefs in penance, admonition and reconciliation as a sacramental response to sin may be the point of attack by a challenger who wants a court to probe the tort law reasonableness of the church's mercy toward the offender. . ." *Pritzlaff v. Archdiocese of Milwaukee*, 194 Wis.2d 302, 533 N.W.2d 780, 790 (1990) cert. denied ___ U.S. ___ 116 S.Ct. 920, 133 L.Ed.2d 849 (1996). In wrestling with the same issue, the Maine Supreme Court found: "To import agency principles wholesale into church governance and to impose liability for any deviation from the secular standard is to impair the free exercise of religion and to control demoninational governance." *Swanson v. Roman Catholic Bishop*, 692 A.2d 441, 445 (Me. 1997). The Maine court went on to conclude: ". . . imposing a secular duty of supervision on the church and enforcing that duty through civil litigation . . . would not serve a societal interest sufficient to overcome the religious freedoms inhabited." *Id.*

See *Doe v. Hartz*, 970 F.Supp. 1375, 1431 (N.D. Iowa 1997) ("Who may become or remain a priest must, almost inevitably, involve an inquiry into church doctrine or policies, barring a negligent hiring or retention claim on First Amendment grounds.") See also, *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, S.Ct. 2372, 49 L.Ed. 154 (1976) ("Ordination of a priest is a 'quintessentially religious' matter, whose resolution the First Amendment commits exclusively to the highest eccleasiastical tribunals in this hierarchical church."); *Gibson v. Brewer*, 952 S.W.2d 239, 247 (Mo. 1997) (First Amendment barred a negligent failure to supervise a clergyman. "Adjudicating reasonableness of a church's supervision of a cleric – what the church 'should know – requires inquiry into religious doctrine."); *Doe v. Evans*, 718 So.2d 286, 291 (Fla.App. 4 Dist. 1998) ("[A] court's determination regarding whether the

church defendant's conduct was 'reasonable' would necessarily entangle the court in issues of the church's religious law, practices and policies. 'Hiring' in a traditional sense does not occur in some religions, where a person is ordained into a particular position in the church, and is assigned to one parish or another.")

Also of note is the case of *Hosey v. Presbyterian Church, U.S.A.*, District Court of Oklahoma County, Case No. CJ-97-7006-61. This case arose out of a Presbyterian minister molesting minors. The national Presbyterian denomination was sued and plaintiffs alleged the national entity was negligent in hiring, supervising and retaining the minister. The Presbyterian Church raised as a major part of its defense the First Amendment and its prohibition against the entanglement of a secular court in reviewing the criteria for the qualifications of a minister. Consequently, Judge Nancy Coats entered summary judgment in favor of the Presbyterian Church because she found the First Amendment issues to be controlling. (A copy of Judge Coats order is entered and attached hereto as Exhibit B) On appeal, the Oklahoma Supreme Court found the other defenses were sufficient to affirm the summary judgment in favor of the Presbyterian Church and, thus, did not find it necessary to address the First Amendment issues. *N.H. v. Presbyterian Church (USA)*, 1999 OK 88, 70 OBJ 3260 ¶28. The result in *Hosey* in no way minimizes these Defendants' First Amendment defense.

The same rationale in the above cases also applies to the instant case. The First Amendment bars this court from having subject matter jurisdiction to hear Plaintiffs' claims that second guess the nature of the relationship between Father Rapp and Defendants.

Accordingly, this court should dismiss Plaintiffs' suit on grounds that it does not have subject matter jurisdiction because of the Defendants' right to free exercise of religion as guaranteed under the First Amendment to the United States Constitution.

PROPOSITION II

PLAINTIFFS HAVE FAILED TO STATE A CLAIM FOR ANY RESPONDEAT SUPERIOR LIABILITY FOR THE ALLEGED ACTIONS OF FATHER RAPP.

In the case of *Presbyterian Church USA*, supra, the Oklahoma Supreme Court held that as a matter of law, "the issue of sexual contact between an ecclesiastic officer and a parishioner . . . is outside the scope of employment". *Id.* ¶ 17. See also *Mount Zion State Bank & Trust v. Central Illinois Annual Conference of United Methodist Church*, 198 Ill.App.3d 881, 556 N.E.2d 1270, appeal denied 135 Ill.2d 558, 564 N.E.2d 839 (1990) cited with approval in *Bladen v. First Presbyterian Church*, 857 P.2d 789, 792 n4 (Okla. 1993) (Pastor molesting minors acted, as a matter of law, beyond the scope of employment and church conference was not liable under the doctrine of respondeat superior.)

Accordingly, any claims of Plaintiffs predicated on a respondeat superior theory of liability for sexual molestation must fail, given the Oklahoma Supreme Court's recent pronouncement on this matter.

CONCLUSION

WHEREFORE, above premises considered, Defendants, Archdiocese of Oklahoma City, Reverend Charles A. Salatka and Reverend Eusebius J. Beltran, respectfully request the court dismiss Plaintiffs' cause of action

on ground that it does not have subject matter jurisdiction to hear Plaintiffs' case and that Plaintiffs have failed to state a claim upon which relief can be granted.

HUCKABY, FLEMING, FRAILEY, CHAFFIN, CORDELL, GREENWOOD & PERRYMAN, L.L.P.

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APPENDIX F

[Filed MAR 23 2000]

IN THE DISTRICT COURT
IN AND FOR OKLAHOMA COUNTY
STATE OF OKLAHOMA

Case No. CJ-99-6364-65

DENNIS W. BALLARD, individually, and
RONALD BALLARD, individually, and
ALGERENE BALLARD, individually,

Plaintiffs,

vs.

JAMES FRANCIS RAPP, individually,
OBLATES OF ST. FRANCIS de SALES,
THE ROMAN CATHOLIC CHURCH and
THE ARCHDIOCESE OF OKLAHOMA CITY
REVERAND CHARLES A. SALATKA,
REVERAND EUSEBIUS J. BELTRAN,
and REVERAND ALFERD J. RUSSELL,

Defendants.

This matter is set for hearing on the 20th day of April 2000, at 1:30 p.m. before the Honorable Niles Jackson

AMENDED MOTION TO DISMISS
OF DEFENDANT OBLATES OF ST. FRANCIS
de SALES AND BRIEF IN SUPPORT

Defendant, Oblates of St. Francis de Sales, an Ohio Corporation ("Oblates"), by and through its attorneys, moves this Court for an Order dismissing Plaintiffs' lawsuit on the grounds that Plaintifs' respondeat superior action fails to state a claim upon which relief can be granted and that Plaintiffs' remaining claims are, by virtue of the provisions of the First Amendment of the United States Constitution, and Article I, Section Two of the Oklahoma Constitution, beyond the subject matter jurisdiction of this court. In support of its Motion to Dismiss, Defendants states as follows:

BRIEF IN SUPPORT

I. INTRODUCTION

A. BACKGROUND

The Plaintiffs' Fourth Amended Petition asserts claims against multiple co-defendants alleging that Dennis Ballard, while still a minor child, was sexually molested by a priest ordained in the Catholic Church and a member of Oblates of St. Francis de Sales. The Plaintiffs' claims against the Oblates fall into two categories: (1) a claim for vicarious liability based solely on Plaintiffs' allegation that the Oblates employed the priest; and (2) claims for direct liability based on theories of negligent hiring, retention and supervision.

The Plaintiffs' vicarious liability claim must be dismissed because molestation of a minor is, as a matter of law, outside the scope of any possible agency or employment. The direct liability claims must be dismissed because they are barred by the constitutional protections against governmental entanglement with religious activity.

B. STANDARD FOR DISMISSAL

A motion to dismiss for failure to state a cause of action should be granted if the plaintiff can prove no set of facts in support of the claim for relief. 12.O.S. §2012-(B)(6); *Gaylord Entertainment Co. v. Thompson,* 958 P.2d 128, 137 (Okla. 1998) (citing *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 102 (1957); *Atchison, Topeka and Santa Fe Ry. Co. v. Buell,* 480 U.S. 557, 568 n.15, 107 S.Ct. 1410, 1417 n.15, 94 L.Ed.2d 563 (1987); *Groce v. Foster,* 1994 OK 88, 880 P.2d 902, 906; *Dyke v. Saint Francis Hospital, Inc.,* 1993 OK 114, 861 P.2d 295, 298-299; and *Frazier v. Bryan Mem. Hosp. Auth.,* 1989 OK 73, 775 P.2d 281, 289.)

As established in the following brief, the Plaintiffs' claims against the Oblates are barred by the First Amendment to the United States Constitution and Article I, Section Two of the Oklahoma Constitution, and are not cognizable under the applicable Oklahoma case law. Although the Oblates denies the Plaintiffs' claims, even if all allegations set forth in the Petition are deemed true, the Plaintiffs' claims against the Oblates must fail as a matter of law. Because Plaintiffs would not be entitled to relief even if all of their allegations are proven, no set of facts can support the Plaintiffs' claim against the Oblates. Therefore, the Plaintiffs' claim must be dismissed pursuant to the provisions of 12 O.S. §2012-(B)(6).

C. MATTERS OUTSIDE THE PLEADINGS SHOULD BE EXCLUDED BY THE COURT

In order to rule upon the present motion, this Court is not required to consider, nor should this Court consider, extraneous evidence. This Motion to Dismiss requires the Court to review the Plaintiffs' petition and,

even assuming all of the allegations therein are true, to adjudicate as a matter of law, that the Plaintiffs' claim must fail. Under this purely legal analysis, the Plaintiffs' factual allegations are not placed into contention, and any additional evidence submitted by the Plaintiffs is unnecessary and should be excluded by the Court.[1] *See Bettis v. Brown*, 819 P.2d 1381, 1382 (Okla. App. 1991) (reviewing court will presume all allegations in petition are true and determine whether claim fails as matter of law).

Paragraph (B) of 12 O.S. §2012 states in part:

> . . . If, on a motion asserting the defense numbered 6 of this subsection to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment. . . .

Unnecessary extraneous evidence submitted by the Plaintiffs may be excluded by this Court, otherwise a summary judgment analysis is used to evaluate the additional matters. 12 O.S. §2012(B). *Bray v. Thomas Energy Systems, Inc.*, Okla. App. Div. 3, 909 P.2d 1191 (1995); *Meadows v. Fain*, 776 P.2d 1270, 1272 (Okla.

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[1] In a response to a similar motion to dismiss by the Archdiocese, Plaintiffs have attempted to introduce evidence beyond the allegations contained in the complaint. This is impermissible. The Oblates anticipate Plaintiffs will submit the same materials in opposition to this motion. The non-moving party cannot turn a motion to dismiss into a motion for summary judgment simply by attaching materials to its opposition brief. If that were the case, a defendant's motion to dismiss could always be turned into a motion for summary judgment. The Oblates do not rely on any extraneous evidence and therefore the materials already presented by the Plaintiffs and those which may be presented in response to this motion should not be considered and will be subject to a motion to strike.

1989). In the typical summary judgment consideration, factual matters are placed into focus, and the court must determine if the evidentiary matters supporting, or opposing, the motion reflect any substantial controversy as to any material fact. *Flanders v. Crane,* 693 P.2d 602 (Okla. 1984). Additionally, in a summary judgment analysis, the court must determine that reasonable people exercising fair and impartial judgment could not reach differing conclusions that reasonable people exercising fair and impartial judgment could not reach differing conclusions upon the undisputed facts. *Hargrave v. Canadian Valley Electric Cooperative,* 792 P.2d 50, 55 (Okla. 1990).

The present motion raises no question about the quality or quantity of the Plaintiffs' evidence. No factual controversies need be identified or evaluated. Only those matters appearing on the face of the pleadings should be considered, and this Court does not need to review extraneous evidence in order to rule upon this motion. Allowing the Plaintiffs to refer to matters outside the pleadings constitutes an unnecessary and burdensome waste of time in light of the purely legal analysis presently before this Court.

II. ARGUMENT AND AUTHORITIES

A. BECAUSE THE PRIEST'S MISCONDUCT WAS OUTSIDE THE SCOPE OF HIS EMPLOYMENT, THE OBLATES CANNOT BE HELD VICARIOUSLY LIABLE UNDER THE DOCTRINE OF *RESPONDEAT SUPERIOR.*

While the majority of analysis in this motion relates to the dismissal of Plaintiffs' claims bases on First Amendment grounds, Plaintiffs' respondeat superior claim can

be dismissed without any constitutional analysis. As a matter of law, a church or religious order is not vicariously liable for a cleric's molestation of a minor. That type of conduct falls outside the scope of anyone's employment.

The Oklahoma Supreme Court has addressed this very issue and has ruled as a matter of law that a church is not vicariously liable for the sexual conduct of a priest or minister. This rule is clearly set forth in *N.H. by Presbyterian Church (U.S.A.)*, 1999 OK 88.

In *N.H. v. Presbyterian Church*, minor plaintiffs who had been molested by a minister sought to impose liability upon the Presbyterian Church under the doctrine of *respondeat superior*. The Oklahoma Supreme Court unequivocally held that vicarious liability under that doctrine could not be imposed upon a church for its minister's sexual misconduct:

> *Respondeat superior* is a legal doctrine holding an employer liable for the willful torts of an employee acting **within the scope of employment in furtherance of assigned duties.** Generally, an assault upon a third person is not within the scope of employment. . . . Nevertheless, an assertion that an act is accomplished during an employment activity is insufficient to assess liability against the employer unless the act was done to accomplish the assigned work.
>
> * * *
>
> . . . [N]o one contends that sexual acts with minors are in any manner authorized or condoned by the national organization. Assuredly, the acts are condemned by the Presbyterian Church. Undoubtedly, such conduct is an anathema to the national organization's religious practices.

> Our survey of national jurisprudence reveals that the majority of jurisdictions considering the issue of sexual contact between an ecclesiastical officer and a parishioner have held that the act is outside the scope of employment as a matter of law. We agree. Ministers should not molest children. When they do, it is not a part of the minister's duty nor customary within the business of the congregation.

Id. at ¶ 14-18 (footnotes omitted).

Oklahoma's rule of law is consistent with the holdings of courts across the country that have faced this very issue. See, e.g., *Tichenor v. Roman Catholic Church of Archdiocese of New Orleans,* 32 F.3d 953, 960 (5th Cir. La. 1994); *Rita M. v. Roman Catholic Archbishop of Los Angeles,* 187 Cal.App.3d 1453, 1461, 232 Cal.Rptr. 685, 690 (1986), review denied (1987); *Byrd v. Faber,* 565 N.E.2d 584, 588 (Ohio 1991); and *Mt. Zion State Bank & Trust v. Central Illinois Annual Conference of United Methodist Church,* 556 N.E. 2d 1270 (Ill. App. 1990); appeal denied 564 N.E.2d 839.

In this case, assuming the truth of Plaintiffs' allegation that the priest was an employee of the Oblates, his misconduct was certainly outside the scope of employment.[2] The mandate of *N.H. v. Presbyterian Church* is clear – any claims asserted by the Plaintiffs which seek to impose liability upon the Oblates under a *respondeat superior* analysis must be dismissed as a matter of law. Accordingly, no vicarious liability can be imposed on the Oblates as a result of the priest's conduct.

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[2]The Oblates have denied that the priest was an employee. For purposes of this motion, however, the Oblates will assume this fact to be true.

B. JUDICIAL INTERFERENCE INTO THE OBLATES' ECCLESIASTICAL RELATIONSHIP WITH ITS CLERGY IS BARRED BY THE FIRST AMENDMENT, AND THIS COURT THEREFORE LACKS SUBJECT MATTER JURISDICTION OVER THE PLAINTIFFS' ACTION.

An employer's conduct can be scrutinized to determine if the employer has deviated from an accepted standard of care and thereby negligently hired, supervised, or retained an employee. Plaintiffs request this court to evaluate the relationship between the priest and the Oblates just as it would any other employer/employee relationship. To evaluate such claims, this court would need to determine the accepted standard of care for a religious order and would need to answer many questions of significant religious concern, such as: When are a person's transgressions so unacceptable that a religious order, no matter its belief in the power of God to forgive and mend, cannot be accepted or retained? Does a religious order have the right or authority to "dismiss" a cleric who has validly received sacred ordination? As demonstrated below, courts around the nation have refused to answer such questions and have refused to apply the general employer standard to scrutinize the relationship between a cleric and church or religious order.

Under the clear mandate of the Free Exercise Clause of the First Amendment to the United States Constitution, civil courts cannot determine who can be ordained a priest or who can be an Oblate. Further, the civil courts cannot determine how or to who within the hierarchy of a church or religious order must discipline a wayward cleric. To preserve the separation between church and state, the civil courts are constitutionally precluded from analyzing the inner workings of

religious institutions. Even emotion and righteousness on the part of the litigants, the lawyers and the judiciary must be tempered so as to avoid the slippery slope of governmental entanglement and preserve the fundamental protections of the Free Exercise Clause.

1. THE UNITED STATES CONSTITUTION

The Free Exercise Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." This protection preserves religious independence from both judicial and legislative state interference. *Kreshik v. Saint Nicholas Cathedral,* 363 U.S. 190, 191, 80 S.Ct. 1037, 1038 (1960).

2. THE OKLAHOMA CONSTITUTION

Section Two of the First Article of the Oklahoma Constitution states, "Perfect toleration of religious sentiment shall be secured, and no inhabitant of the State shall ever be molested in person or property on account of his or her mode of religious worship; and no religious test shall be required for the exercise of civil or political rights. Polygamous or plural marriages are forever prohibited."

3. THE UNITED STATES SUPREME COURT HAS CONSISTENTLY HELD THAT GOVERNMENTAL ENTANGLEMENT INTO PROTECTED RELIGIOUS ACTIVITY IS BARRED BY THE FIRST AMENDMENT.

Since its ratification in 1791, the First Amendment has been invoked by the United States Supreme Court to

shield and protect religious freedom. Under the Fourteenth Amendment, the protections guaranteed by the First Amendment apply to state, as well as federal, governmental intrusion into protected rights. *Cantwell v. State of Connecticut*, 310 U.S. 296, 60 S.Ct. 900 (1940). "The essential characteristic of these [religious] liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed." *Id.*, 60 S.Ct. at 906.

Courts are prohibited from meddling with the inner workings of all religious organizations. These principles of non-interference and religious autonomy are obviously applicable to the Catholic religious community. Oklahome state courts cannot scrutinize the merits or procedure behind the Oblates' relationship with its clergy.

4. TRADITIONAL TORT PRINCIPALS CANNOT BE APPLIED IN THE CASE AT BAR WITHOUT REQUIRING JUDICIAL INTERPRETATION OF CHURCH DOCTRINE AND POLICY.

The Supreme Court of Wisconsin recently dealt with the fundamental, Constitutional right of religious organizations to be free from governmental interference. In *Pritzlaff v. Archdiocese of Milwaukee*, 194 N.W.2d 780 (Wis. 1995), the alleged sexual misconduct of a priest formed the basis for a parishioner's claim against the church for negligent hiring, retention, training and supervision of its clergy. The court found that the First Amendment prohibited judicial inquiry into the practices of the Archdiocese and held that the plaintiff had failed to state a claim upon which relief could be granted. *Id.* at 789-90.

First, in considering whether a claim for negligent hiring or retention could be pressed, the court stated:

To establish a claim for negligent hiring or retention [plaintiff] would have to establish that the Archdiocese was negligent in hiring or retaining Fr. Donovan because he was incompetent or otherwise unfit. But, we conclude that the First Amendment to the United States Constitution prevents the courts of this state from determining what makes one competent to serve as a Catholic priest since such a determination would require interpretation of church canons and internal church policies and practices. Therefore, [plaintiff's] claim is not capable of enforcement by the courts.

The rationale for this rule was recently aptly summarized by a pair of commentators as follows:

> Examining the ministerial selection policy, which is 'infused with the religious tenets of the particular sect,' entangles the court in qualitative evaluation of religious norms. Negligence requires the court to create a 'reasonable bishop' norm. Beliefs in penance, admonition and reconciliation as a sacramental response to sin may be the point of attack by a challenger who wants a court to probe the tort-law reasonableness of the church's mercy toward the offender . . . The tort of negligent selection of unsuitable teachers has been recognized in civil courts. If negligent selection of a potential pedophile for the religious office of a priest, minister or rabbi is a tort as to future child victims, will civil courts also hear Title VII challenges by the non-selected seminarian against the theological seminary that declines to ordain a plaintiff into ministry because of his psychological profile? How far shall the courts' qualitative entanglement with religious selectivity extend?

Id. at 790 (quoting James T. O'Reilly & Joann M. Strasser, *Clergy Sexual Misconduct: Confronting the Difficult Constitutional and Institutional Liability Issues*, 7 St. Thomas L. Rev. 31 (1994)).

Next, the *Pritzlaff* court discussed whether a claim could be pressed for the supervision and training of clergy:

> [S]tate inquiry into the training and supervision of clergy . . . **is nonetheless prohibited by the First Amendment under most if not all circumstances.** As one court stated in refusing to allow a claim for negligent supervision:
>
> > [A]ny inquiry into the policies and practices of the church defendants in hiring or supervising their clergy raises the same kinds of First Amendment problems of entanglement discussed above, which might involve the court in making sensitive judgments about the propriety of the church Defendants' supervision in light of their religious beliefs. . . . **The traditional denominations each have their own intricate principles of governance, as to which the state has no right of visitation.** Church governance is founded in scripture, modified by reformers over almost two millenia.

Id. at 791 (quoting *Schmidt v. Bishop*, 779 F.Supp. 321, 332 (S.D.N.Y. 1991)).[3]

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[3]The *Schmidt* court concludes its opinion with an important statement:

> It would therefore also be inappropriate and unconstitutional for this Court to determine after the fact that the ecclesiastical authorities negligently supervised or retained the defendant Bishop. Any award of damages would have a chilling effect leading indirectly to state control over the future conduct of affairs of a religious denomination, a result violative of the text and history of the establishment clause. 779 F.Supp. at 331.

The Wisconsin court reaffirmed its holding in *Pritzlaff* and described the constitutional barriers which prevent state judicial review of ecclesiastical relationships in the Roman Catholic church in *L.L.N. v. Clauder,* 209 Wis.2d 674, 563 N.W.2d 434, 65 USLW 2774 (Wis. May 23, 1997). The court stated:

> [O'Reilly and Strasser] further eleborate on the reasons why "**the measurement of duty and reasonableness needed to find negligence will inevitably entangle the civil court in the nuances of religious discipline practices.**" For example, O'Reilly and Strasser state that the Roman Catholic Church has internal disciplinary procedures that are influences by a religious belief in reconciliation and mercy. They explain:
>
> > The reconciliation and counseling of the errant clergy peson involves more than a civil employer's file reprimand or three day suspension without pay for misconduct. **Mercy and forgiveness of sin** may be concepts familiar to bankers but they have no place in the discipline of bank tellers. For clergy, they are interwoven in the institution's norms and practices.
>
> Therefore, due to this strong belief in redemption, a bishop may determine that a wayward priest can be sufficiently reprimanded through counseling and prayer. **If a court was asked to review such conduct to determine whether the bishop should have taken some other action, the court would directly entangle itself in the religious doctrines of faith, responsibility, and obedience.**
>
> Likewise, O'Reilly and Strasser explain that negligent supervision claims would require a court to formulate a "reasonable cleric" standard, which would vary depending on the cleric involved, i.e., reasonable Presbyterian pastor standard, reasonable

> Catholic archbishop standard, and so on. Such individualized standards would be required because, as previously mentioned, **church doctrines and practices are intertwined with the supervision and discipline of clergy.** However, as O'Reilly and Strasser state: "Our pluralistic society dislikes having its neutral jurists place themselves in the role of a 'reasonable chief rabbi,' 'reasonable bishop,' etc., because of the degree of involvement that must accompany such decisions framework for the civil tort judge." This further explains why this court held that negligent supervision claims are "prohibited by the First Amendment under most if not all circumstances."

L.L.N. v. Clauder, 209 Wis.2d at 689-91 (quoting O'Reilly & Strasser, *supra*)

Another state-court opinion provides a valuable outline of the issues facing this Court in the case at bar. In *Swanson v. Roman Catholic Bishop of Portland,* 692 A.2d 441 (Me. 1997), Maine's highest court considered the issue of whether tort liability could be imposed against the church for negligent supervision of a priest. The court held that the plaintiffs' claim was barred by constitutional principles. *Id.* at 444. The *Swanson* court stated:

> When a civil court undertakes to compare the relationship between a religious institution and its clergy with the agency relationship of the business world, **secular duties are necessarily introduced into the ecclesiastical relationship and the risk of constitutional violation is evident.**

Id. The court reasoned that the principles of agency and actual authority involved in the plaintiffs' claim required an examination of religious law and useage regarding the church's authority over the priest. The court

noted the important point that canon law severely restricted the ability of the church to remove, transfer and supervise the priest, and found that the First Amendment precluded an inquiry into the allocation of power within a heirarchical church. *Id.*

The court acknowledged that some other courts had allowed negligent supervision claims against churches if the facts required no interpretation of church doctrine. However, the *Swanson* court found that an inquiry into the ecclesiastical relationship between the priest and the Catholic Church was unconstitutional:

> Even assuming that the trial court could discern the existence of actual authority without determining questions of church doctrine or polity or could base the requisite agency relationship on apparent authority, constitutional obstacles remain. **The imposition of secular duties and liability on the church as a "principal" will infringe upon its right to determine the standards governing the relationship between the church, its bishop, and the parish priest.**

Id. at 444-45.

The court also rejected those cases where the claim was allowed to proceed if the defendant had allegedly received notice that an individual clergyman was potentially dangerous. The court concluded that imposing a secular duty of supervision on the church would restrict the church.s freedom to adhere to its ecclesiastical procedures. *Id.* at 445.

The Oklahoma Supreme Court has not ruled on the issue of whether the First Amendment precludes claims for employment-related liability against an ecclesiastical religious institution. *N.H. v. Presbyterian Church (U.S.A.)*, 1999 OK 88, ¶26 (First Amendment anal-

ysis unnecessary in case involving pastoral sexual misconduct because underlying facts supported no employment-related liability against church); *Bladen v. First Presbyterian Church,* 857 P.2d 789, 797 (Okla. 1993) (Because plaintiffs' claims against minister were not cognizable, employment-related claims against church were not viable and First Amendment analysis was not reached).[4]

However, the Oklahoma Supreme Court has held that the First Amendment prohibits the government from imposing its own ideas on the religious organization. *Guinn v. Church of Christ of Collinsville, supra,* 775 P.2d 766, 772 (Okla. 1989) (under the First Amendment people may freely consent to being spiritually governed by an established set of ecclesiastical tenets defined and carried out by those chosen to interpret and impose them.)

In the present action, to determine Plaintiffs' claims, this Court must necessarily evaluate and interpret the policies and practices of the Oblates and its internal organization. However, federal and state courts have repeatedly acknowledged the central fact that the governance of clergy within the Catholic religion is controlled by fundamental religious beliefs and church

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[4]However, in *N.H. v. Presbyterian Church, supra,* the Honorable Nancy Coats of the Seventh Judicial District of the State of Oklahoma granted summary judgment on the grounds that the plaintiff's claims against the church were barred by the First Amendment. (A copy of the Judgment entered in that case is attached as Exhibit "A") On appeal, the Supreme Court affirmed the trial court's dismissal of the plaintiff's case on other grounds. (*See* discussion of *respondeat superior, supra.*) Nonetheless, Judge Coats was obviously persuaded by the constitutional argument, and granted summary judgment in favor of the defendant on all claims and causes of action.

doctrine. Application of traditional tort principles of agency and employment-related liability in the present case would result in excessive entanglement between church and state. Such judicial scrutiny would inhibit religious freedom, and would ultimately result in state endorsement of one approved method of religious organization over another. The Free Exercise Clause of the First Amendment prohibits a state civil court from adjudicating the matters set forth in the present case.

C. ALLEGATIONS OF NOTICE OR KNOWLEDGE DO NOT CORRECT THE CONSTITUTIONAL INFIRMITIES OF PLATINFIFFS' CLAIM

Plaintiffs will undoubtedly place great emphasis upon the issue of notice, and urge that the allegations of knowledge on the part of the Oblates open the door for state scrutiny of the ecclesiastical relationship at issue. Plaintiffs' claim requires this Court to evaluate the knowledge and conduct of the Oblates and determine whether the church should, in some situations, abandon its traditional norms regarding the selection of clergy.

However, a civil court or jury is not permitted to discard an established ecclesiastical policy and impose its own judgment about what is appropriate. Even when faced with emotional issues such as sexual misconduct, the courts recognize the constitutional ramifications of reviewing and ruling upon clerical governance. Whether or not the Plaintiffs allege prior knowledge in their petition, the basic fact remains that religious belief and doctrinal policy control the manner in which a priest is called and allowed to serve.

The Plaintiffs' allegations of knowledge and notice make no impact upon the constitutional barrier which removes this case from the subject matter jurisdiction

of this Court. This principle is established in *Ayon v. Gourley*, 47 F.Supp.2d 1246 (Colo. Dist. Ct. 1998). There, the Archdiocese was sued for damages arising from sexual abuse by a priest. The plaintiff alleged that the Archdiocese had prior notice of the priest's propensities, and therefore asserted a claim for negligent hiring and supervision, as well as a claim for outrageous conduct. The court found that dismissal of the petition would be proper because a consideration of *any of the claims* against the Archdiocese would be unconstitutional. *Id.* at 1251. The court specifically stated that the outrageous conduct claim, where the plaintiff claimed that church defendants acted with knowledge, could not open the door for judicial scrutiny of church procedures:

> [T]he analysis of this claim for First Amendment purposes would appear to be very similar to that for the negligent supervision claim. The difference, of course, is the intentional nature of the act. **This difference does not change the fact that it is the Archdiocese Defendants' oversight riles with regard to [the priest] that would have to be considered to determine if their conduct was appropriate. Whether examined for negligence or intent, it is the Archdiocese Defendants' actions in supervising [the priest] which would be at issue for both claims.**
>
> * * *
>
> The court finds that the result is the same for the negligent supervision and outrageous conduct claims. . . . [T]he procedures that the Archdiocese Defendants have in place regarding supervision would have to be examined to determine whether they were reasonable and adequate. **This would clearly be inappropriate governmental involvement and a burden on these Defendants' exercise of religion. Consequently, Plaintiff's claims against the**

Archdiocese Defendants must be dismissed as violative of the First Amendment.

Similarly, in *Swanson v. Roman Catholic Bishop of Portland, supra,* 692 A.2d 441, the court rejected the position that a claim could proceed if the defending church had knowledge that an individual clergyman was potentially dangerous:

> We conclude, however, that these few courts have failed to maintain the appropriate degree of neutrality required by the United States and Maine Constitutions. Although "[t]he Supreme Court has consistently recognized that the religion clauses are subject to a balancing of interests test," the Court "has also concluded that certain civil rights protected in secular settings are not sufficiently compelling to overcome certain religious interests." We conclude that, on the facts of this case, imposing a secular duty of supervision on the church and enforcing that duty through civil liability would restrict its freedom to interact with its clergy in the manner deemed proper by ecclesiastical authorities and would not serve a societal interest sufficient to overcome the religous freedoms inhibited.

Id. at 445 (citing *Minker v. Baltimore Annual Conference of United Methodist Church,* 894 F.2d 1354 (D.C. Cir. 1990)).

The case law discussed in this brief repeatedly acknowledges that a priest's superiors are very limited in their power to control or remove him from his service in the church. The concepts of knowledge, forgiveness, confession and redemption are deeply and inextricably intertwined in the Catholic religion. These beliefs are tightly woven together, and one cannot pluck a single thread from the tapestry of concepts that is Catholicism and

expect that thread to mesh with the secular weave of employment-related tort law.

Even the mere argument that the defendants' knowledge and subsequent actions somehow qualify the case for judicial scrutiny requires a court to make a threshold interpretation of religious doctrine.[5] At what point should the ecclesiastical regime set aside the canons of the church and mold its behavior to comply with common-law tort principles? Every judge and juror in the land will have a different opinion about this issue. Every jurisdiction will apply a different standard of conduct.

The Plaintiffs' allegations regarding knowledge and notice on the part of the Oblates do not open the door to

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[5]Even at seemingly surface-level analysis, governmental interpretation of religious policy has been avoided by the courts as ecesssive entanglements. In *Lemon v. Kurtzman*, 403 U.S. 602, 619-620, 91 S.Ct. 2105, 2114-15 (1971), the Court reviewed the system used to determine whether a religious school could receive state financial aid:

> The statute excludes teachers employed by nonpublic schools whose average per-pupil expenditures on secular education equal or exceed the comparable figures for public schools. In the event that the total expenditures of an otherwise eligible school exceed this norm, the program requires the government to examine the school's records in order to determine how much of the total expenditures is attributable to secular education and how much to religious activity. **This kind of state inspection and evaulation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches.** The Court noted 'the hazards of government supporting churches' in *Walz v. Tax Commission*, 397 U.S., at 675, 90 S.Ct., at 1414, and we cannot ignore here the danger that pervasive modern governmental power will ultimately intrude on religion and thus conflict with the Religion Clauses. *Lemon v. Kurtzman*, 403 U.S. 602, 619-620, 91 S.Ct. 2105 (1971)

judicial review of the Oblates' relationship with its clergy. The concept of religious autonomy must be uniformly applied in all cases which seek to weaken the wall between church and state. The basic fact must not be lost that the Plaintiffs' claim, however emotional and inflammatory, is barred by the Constitution and must be dismissed as a matter of law. Even passion and righteousness on the part of the judiciary and the lawyers must be tempered so as to avoid the slippery slope of governmental entanglement.

III. CONCLUSION

The claim set forth in Plaintiffs' Fourth Amended Petition based upon the doctrine of *respondeat superior* fails to state a claim against this Defendant for which relief may be had. The priest's actions were outside the scope of any employment relationship he may have had with the Oblates, and as such vicarious liability cannot be imposed upon the Oblates for such actions.

Plaintiffs also ask this Court to impose tort liability for the manner in which the Oblates hired, trained and supervised the priest. In so doing, Plaintiffs' quest requires the state to create and impose a legal duty on a religious institution regarding the manner in which priests are called and ordained. To adjudicate Plaintiffs' case, this Court must fabricate a "reasonable Oblate Provincial" standard of conduct. In order to impose liability , the Court must apply that fabricated standard to doctrinal concepts such as mercy and redemption which are intertwined in the rules of the Catholic ecclesiastical organization. A secular court's analysis of those religious beliefs in the context of a civil lawsuit violates the basic mandate of the First Amendment. Traditional tort principles simply cannot be applied to the

religious mechanism by which clergy are called into service without breaching the Constitutional wall separating the church and the state.

WHEREFORE, Defendant, Oblates of St. Francis de Sales, pursuant to the provisions of the First Amendment of the United States Constitution, Article I, Section Two of the Oklahoma Constitution, and 12 Okla. Stat. §2012, respectfully requests this Court to dismiss Plaintiffs' lawsuit on the grounds that subject matter jurisdiction is lacking, and that the Plaintiffs have failed to state a claim upon which relief may be granted.

Respectfully submitted,

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[Certificate of Service Omitted in Printing]

APPENDIX G

[Filed MAR 23 2000]

IN THE DISTRICT COURT
WITHIN AND FOR OKLAHOMA COUNTY
STATE OF OKLAHOMA

Case No. CJ-99-6829-65

C.J., a minor, by and through his parents and next of friends, JIMMIE BARTLETT JOHNSON, JR., and PAMELA GAYLE JOHNSON, and JIMMIE BARTLETT JOHNSON, JR., individually and PAMELA GAYLE JOHNSON, individually,

Plaintiffs

vs.

JAMES FRANCIS RAPP. individually, OBLATES OF ST. FRANCIS de SALES, THE ROMAN CATHOLIC CHURCH and THE ARCHDIOCESE OF OKLAHOMA CITY, REVEREND CHARLES A. SALATKA, REVEREND EUSEBIUS J. BELTRAN, and REVEREND ALFERD J. RUSSELL

Defendants.

This matter is set for hearing on the 20th day of April, 2000, at 1:30 p.m. before the Honorable Niles Jackson

AMENDED MOTION TO DISMISS OF DEFENDANT OBLATES OF ST. FRANCIS de SALES AND BRIEF IN SUPPORT

Defendant, Oblates of St. Francis de Sales, an Ohio Corporation ("Oblates"), by and through its attorneys, moves this Court for an Order dismissing Plaintiffs' lawsuit on the grounds that Plaintiffs' respondeat superior action fails to state a claim upon which relief can be granted and that Plaintiffs' remaining claims are, by virtue of the provisions of the First Amendment of the United States Constitution, and Article I, Section Two of the Oklahoma Constitution, beyond the subject matter jurisdiction of this court. In support of its Motion to Dismiss, Defendant states as follows:

BRIEF IN SUPPORT

I. INTRODUCTION

A. BACKGROUND

The Plaintiffs' Third Amended Petition asserts claims against multiple co-defendants alleging that C.J., a minor child, was sexually molsted by a priest ordained in the Catholic Church and a member of Oblates of St. Francis de Sales. The Plaintiffs' claims against the Oblates fall into two categories: (1) a claim for vicarious liability based solely on Plaintiffs' allegation that the Oblates employed the priest; and (2) claims for direct liability based on theories of negligent hiring, retention and supervision.

The Plaintiffs' vicarious liability claim must be dismissed because molestation of a minor is, as a matter of law, outside the scope of any possible agency or employ-

ment. The direct liability claims must be dismissed because they are barred by the constitutional protections against governmental entanglement with religious activity.

B. STANDARD FOR DISMISSAL

A motion to dismiss for failure to state a cause of action should be granted if the plaintiff can prove no set of facts in support of the claim for relief. 12 O.S. §2012-(B)(6); *Gaylord Entertainment Co. v. Thompson,* 958 P.2d 128, 137 (Okla. 1998) (citing *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 102 (1957); *Atchison, Topeka and Santa Fe Ry. Co. v. Buell,* 480 U.S. 557, 568 n.15, 107 S.Ct. 1410, 1417 n.15, 94 L.Ed.2d 563 (1987); *Groce v. Foster,* 1994 OK 88, 880 P.2d 902, 906; *Dyke v. Saint Francis Hospital, Inc.,* 1993 OK 114, 861 P.2d 295, 298-299; and *Frazier v. Bryan Mem. Hosp. Auth.,* 1989 OK 73, 775 P.2d 281, 289.)

As established in the following brief, the Plaintiffs' claims against the Oblates are barred by the First Amendment to the United States Constitution and Article I, Section Two of the Oklahoma Constitution, and are not cognizable under the applicable Oklahoma case law. Although the Oblates denies the Plaintiffs' claims, even if all allegations set forth in the Petition are deemed true, the Plaintiffs' claims against the Oblates must fail as a matter of law. Because Plaintiffs would not be entitled to relief even if all of their allegations are proven, no set of facts can support the Plaintiffs' claim against the Oblates. Therefore, the Plaintiffs' claim must be dismissed pursuant to the provisions of 12 O.S. §2012-(B)(6).

C. MATTERS OUTSIDE THE PLEADINGS SHOULD BE EXCLUDED BY THE COURT

In order to rule upon the present motion, this Court is not required to consider, nor should this Court consider, extraneous evidence. This Motion to Dismiss requires the Court to review the Plaintiffs' petition and, even assuming all of the allegations therein are true, to adjudicate as a matter of law, that the Plaintiffs' claim must fail. Under this purely legal analysis, the Plaintiffs' factual allegations are not placed into contention, and any additional evidence submitted by the Plaintiffs is unnecessary and should be excluded by the Court.[1] *See Bettis v. Brown*, 819 P.2d 1381, 1382 (Okla. App. 1991) (reviewing court will presume all allegations in petition are true and determine whether claim fails as matter of law).

Paragraph (B) of 12 O.S. §2012 states in part:

> . . . If, on a motion asserting the defense numbered 6 of this subsection to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment . . . .

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[1] In a response to a similar motion to dismiss by the Archdiocese, Plaintiffs have attempted to introduce evidence beyond the allegations contained in the complaint. This is impermissible. The Oblates anticipate Plaintiffs will submit the same materials in opposition to this motion. The non-moving party cannot turn a motion to dismiss into a motion for summary judgment simply by attaching materials to its opposition brief. If that were the case, a defendant's motion to dismiss could always be turned into a motion for summary judgment. The Oblates do not rely on any extraneous evidence and therefore the materials already presented by the Plaintiffs and those which may be presented in response to this motion should not be considered and will be subject to a motion to strike.

Unnecessary extraneous evidence submitted by the Plaintiffs may be excluded by this Court, otherwise a summary judgment analysis is used to evaluate the additional matters. 12 O.S. §2012(B). *Bray v. Thomas Energy Systems, Inc.*, Okla.App. Div. 3, 909 P.2d 1191 (1995); *Meadows v. Fain*, 776 P.2d 1270, 1272 (Okla. 1989). In the typical summary judgment consideration, factual matters are placed into focus, and the court must determine if the evidentiary matters supporting, or opposing, the motion reflect any substantial controversy as to any material fact. *Flanders v. Crane*, 693 P.2d 602 (Okla. 1984). Additionally, in a summary judgment analysis, the court must determine that reasonable people exercising fair and impartial judgment could not reach differing conclusions upon the undisputed facts. *Hargrave v. Canadian Valley Electric Cooperative*, 792 P.2d 50, 55 (Okla. 1990).

The present motion raises no question about the quality or quantity of the Plaintiffs' evidence. No factual controversies need be identified or evaluated. Only those matters appearing on the face of the pleadings should be considered, and this Court does not need to review extraneous evidence in order to rule upon this motion. Allowing the Plaintiffs to refer to matters outside the pleadings constitutes an unnecessary and burdensome waste of time in light of the purely legal analysis presently before this Court.

II. ARGUMENT AND AUTHORITIES

A. BECAUSE THE PRIEST'S MISCONDUCT WAS OUTSIDE THE SCOPE OF HIS EMPLOYMENT, THE OBLATES CANNOT BE HELD VICARIOUSLY LIABLE UNDER THE DOCTRINE OF *RESPONDEAT SUPERIOR.*

While the majority of analysis in this motion relates to the dismissal of Plaintiffs' claims bases on First Amendment grounds, Plaintiffs' respondeat superior claim can be dismissed without any constitutional analysis. As a matter of law, a church or religious order is not vicariously liable for a cleric's molestation of a minor. That type of conduct falls outside the scope of anyone's employment.

The Oklahoma Supreme Court has addresses this very issue and has ruled as a matter of law that a church is not vicariously liable for the sexual conduct of a priest or minister. This rule is clearly set forth in *N.H. v. Presbyterian Church (U.S.A.)*, 1999 OK 88.

In *N.H. v. Presbyterian Church,* minor plaintiffs who had been molested by a minister sought to impose liability upon the Presbyterian Church under the doctrine of *respondeat superior.* The Oklahoma Supreme Court unequivocally held that vicarious liability under that doctrine could not be imposed upon a church for its minister's sexual misconduct:

> *Respondeat superior* is a legal doctrine holding an employer liable for the willful torts of an employee acting within the scope of employment in furtherance of assigned duties. Generally, an assault upon a third person is not within the scope of employment. . . . Nevertheless, an assertion that an act is accomplished during an employment activity is insufficient to assess liability against the employ-

> er unless the act was done to accomplish the assigned work.
>
> * * *
>
> . . . [N]o one contends that sexual acts with minors are in any manner authorized or condoned by the national organization. Assuredly, the acts are condemned by the Presbyterian Church. Undoubtedly, such conduct is an anathema to the national organization's religious practices.
>
> Our survey of national jurisprudence reveals that the majority of jurisdictions considering the issue of sexual contact between an ecclesiastic officer and a parishioner have held that the act is outside the scope of employment as a matter of law. We agree. Ministers should not molest children. When they do, it is not a part of the minister's duty nor customary within the business of the congregation.

Id. at ¶ 14-18 (footnotes omitted).

Oklahoma's rule of law is consistent with the holdings of courts across the country that have faced this very issue. See, e.g., *Tichenor v. Roman Catholic Church of Archdiocese of New Orleans*, 32 F.3d 953, 960 (5th Cir. La. 1994); *Rita M. v. Roman Catholic Archbishop of Los Angeles*, 187 Cal.App.3d 1453, 1461, 232 Cal.Rptr. 685, 690 (1986), review denied (1987); *Byrd v. Faber*, 565 N.E.2d 584, 588 (Ohio 1991); and *Mt. Zion State Bank & Trust v. Central Illinois Annual Conference of United Methodist Church*, 556 N.E.2d 1270 (Ill. App. 1990); appeal denied 564 N.E.2d 839.

In this case, assuming the truth of Plaintiffs' allegation that the priest was an employee of the Oblates, his misconduct was certainly outside the scope of employ-

ment.[2] The mandate of *N.H. v. Presbyterian Church* is clear – any claims asserted by the Plaintiffs which week to impose liability upon the Oblates under a *respondeat superior* analysis must be dismissed as a matter of law. Accordingly, no vicarious liability can be imposed on the Oblates as a result of the priest's conduct.

B. JUDICIAL INTERFERENCE INTO THE OBLATES' ECCLESIASTICAL RELATIONSHIP WITH ITS CLERGY IS BARRED BY THE FIRST AMENDMENT, AND THIS COURT THEREFORE LACKS SUBJECT MATTER JURISDICTION OVER THE PLAINTIFFS' ACTION.

An employer's conduct ca be scrutinized to determine if the employer has deviated from an accepted standard of care and thereby negligently hired, supervised, or retained an employee. Plaintiffs request this court to evaluate the relationship between the priest and the Oblates just as it would any other employer/employee relationship. To evaluate such claims, this court would need to determine the accepted standard of care for a religious order and would need to answer many questions of significant religious concern, such as: When are a person's transgressions so unacceptable that a religious order, no matter its belief in the power of God to forgive and mend, cannot be accepted or retained? Does a religious order have the right or authority to "dismiss" a cleric who has validly received sacred ordination? As demonstrated below, courts around the nation have

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[2]The Oblates have denied that the priest was an employee. For purposes of this motion, however, the Oblates will assume this fact to be true.

refused to answer such questions and have refused to apply the general employer standard to scrutinize the relationship between a cleric and church or religious order.

Under the clear mandate of the Free Exercise Clause of the First Amendment to the United States Constitution, civil courts cannot determine who can be ordained a priest or who can be an Oblate. Further, the civil courts cannot determine how or who within the hierarchy of a church or religious order must discipline a wayward cleric. To preserve the separation between church and state, the civil courts are constitutionally precluded from analyzing the inner workings of religious institutions. Even emotion and righteousnexx on the part of the litigants, the lawyers and the judiciary must be tempered so as to avoid the slippery slope of governmental entanglement and preserve the fundamental protections of the Free Exercise Clause.

1. THE UNITED STATES CONSTITUTION

The Free Exercise Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion, or **prohibiting the free exercise thereof. . . .**" This protection preserves religious independence from both judicial and legislative state interference. *Kreshik v. Saint Nicholas Cathedral,* 363 U.S. 190, 191, 80 S.Ct. 1037, 1038 (1960).

2. THE OKLAHOMA CONSTITUTION

Section Two of the First Article of the Oklahoma Constitution states, "Perfect toleration of religious sentiment shall be secured, and no inhabitant of the State shall ever be molsted in person or property on account of his or her mode of religious worship; and no religious

test shall be required for the exercise of civil or political rights. Polygamous or plural marriages are forever prohibited."

3. THE UNITED STATES SUPREME COURT HAS CONSISTENTLY HELD THAT GOVERNMENTAL ENTANGLEMENT INTO PROTECTED RELIGIOUS ACTIVITY IS BARRED BY THE FIRST AMENDMENT.

Since its ratification in 1791, the First Amendment has been invoked by the United States Supreme Court to shield and protect religious freedom. Under the Fourteenth Amendment, the protections guaranteed by the First Amendment apply to state, as well as federal, governmental intrusion into protected rights. *Cantwell v. State of Connecticut*, 310 U.S. 296, 60 S.Ct. 900 (1940). "The essential characteristic of these [religious] liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed." *Id.*, 60 S.Ct. at 906.

Courts are prohibited from meddling with the inner workings of all religious organizations. These principles of non-interference and religious autonomy are obviously applicable to the Catholic religious community. Oklahoma state courts cannot scrutinize the merits or procedure behind the Oblates' relationship with its clergy.

4. TRADITIONAL TORT PRINCIPALS CANNOT BE APPLIED IN THE CASE AT BAR WITHOUT REQUIRING JUDICIAL INTERPRETATION OF CHURCH DOCTRINE AND POLICY.

The Supreme Court of Wisconsin recently dealt with the fundamental, Constitutional right of religious organizations to be free from governmental interference. In *Pritzlaff v. Archdiocese of Milwaukee,* 194 N.W.2d 780 (Wis. 1995), the alleged sexual misconduct of a priest formed the basis for a parishioner's claim against the church for negligent hiring, retention, training and supervision of its clergy. The court found that the First Amendment prohibited judicial inquiry into the practices of the Archdiocese and held that the plaintiff had failed to state a claim upon which relief could be granted. *Id.* at 789-90.

First, in considering whether a claim for negligent hiring or retention could be pressed, and court stated:

> To establish a claim for negligent hiring or retention [plaintiff] would have to establish that the Archdiocese was negligent in hiring or retaining Fr. Donoven because he was incompetent or otherwise unfit. But, we conclude that the First Amendment to the United States Constitution prevents the courts of this state from determining what makes one component to serve as a Catholic priest since such a determination **would require interpretation of church canons and internal church policies and practices.** Therefore, [plaintiff's] claim is not capable of enforcement by the courts.

The rationale for this rule was recently aptly summarized by a pair of commentators as follows:

> Examining the ministerial selection policy, which is 'infused with the religious tenets of the partic-

> ular sect,' entangles the court in qualitative evaluation of religious norms. Negligence requires the court to **create a 'reasonable bishop' norm.** Beliefs in penance, admonition and reconciliation as a sacramental response to sin may be the point of attack by a challenger who wants a court to **probe the tort-law reasonableness of the church's mercy toward the offender.** . . . The tort of negligent selection of unsuitable teachers has been recognized in civil courts. If negligent selection of unsuitable teachers has been recognized in civil courts. If negligent selection of a potential pedophile for the religious office of a priest, minister or rabbi is a tort as to future child victims, will civil courts also hear Title VII challenges by the non-selected seminarian against the theological seminary that declines to ordain a plaintiff into ministry because of his psychological profile? **How far shall the courts' qualitative entanglement with religious selectivity extend?**

Id. at 790 (quoting James T. O'Reilly and Joann M. Strasser, *Clergy Sexual Misconduct: Confronting the Difficult Constitutional and Institutional Liability Issues,* 7 St. Thomas L.Rev. 31 (1994)).

Next, the *Pritzlaff* court discussed whether a claim could be pressed for the supervision and training of clergy:

> [S]tate inquiry into the training and supervision of clergy . . . **is nonetheless prohibited by the First Amendment under most if not all circumstances.** As one court stated in refusing to allow a claim for negligent supervision:
>
> > [A]ny inquiry into the policies and practices of the church defendants in hiring or supervising their clergy raises the same kinds of First Amend-

> ment problems of entanglement discussed above, which might involve the court in making sensitive judgments about the propriety of the church Defendants' supervision in light of their religious beliefs. . . . **The traditional denominations each have their own intricate principles of governance, as to which the state has no right of visitation.** Church governance is founded in scripture, modified by reformers over almost two millenia.

Id. at 791 (quoting *Schmidt v. Bishop*, 779 F.Supp. 321, 332 (S.D.N.Y. 1991)).[3]

The Wisconsin court reaffirmed its holding in *Pritzlaff* and described the constitutional barriers which prevent state judicial review of ecclesiastical relationships in the Roman Catholic church in *L.L.N. v. Clauder*, 209 Wis.2d 674, 563 N.W.2d 434, 65 USLW 2774 (Wis. May 23, 1997). The court stated:

> [O'Reilly and Strasser] further elaborate on the reasons why "**the measurement of duty and reasonableness needed to find negligence will inevitably entangle the civil court in the nuances of religious discipline practices.**" For example, O'Reilly and Strasser state that the Roman Catholic Church has internal disciplinary procedures that are influenced by a religious belief in reconciliation and mercy. They explain:

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[3] The *Schmidt* court concludes its opinion with an important statement:

> **It would therefore also be inappropriate and unconstitutional for this Court to determine after the fact that the ecclesiastical authorities negligently supervised or retained the defendant Bishop. Any award of damages would have a chilling effect leading indirectly to state control over the future conduct of affairs of a religious denomination, a result violative of the text and history of the establishment clause. 779 F. Supp. at 331.**

> The reconciliation and counseling of the errant clergy person involves more than a civil employer's file reprimant or three day suspension without pay for misconduct. **Mercy and forgiveness of sin** may be concepts familiar to bankers but they have no place in the discipline of bank tellers. For clergy, they are interwoven in the institution's norms and practices.

Therefore, due to this strong belief in redemption, a bishop may determine that a wayward priest can be sufficiently reprimanded through counseling and prayer. **If a court was asked to review such conduct to determine whether the bishop should have taken some other action, the court would directly entangle itself in the religious doctrines of faith, responsibility, and obedience.**

Likewise, O'Reilly and Strasser explain that negligent supervision claims would require a court to formulate a "reasonable cleric" standard, which would vary depending on the cleric involved, i.e., reasonable Presbyterian pastor standard, reasonable Catholic archbishop standard, and so on. Such individualized standards would be required because, as previously mentioned, **church doctrines and practices are intertwined with the supervision and discipline of clergy.** However, as O'Reilly and Strasser state: "Our pluralistic society dislikes having its neutral jurists place themselves in the role of a 'reasonable chief rabbi,' 'reasonable bishop,' etc., because of the degree of involvement that must accompany such decisional framework for the civil tort judge." This further explains why this court held that negligent supervision claims are "prohibited by the First Amendment under most if not all circumstances."

L.L.N. v. Clauder, 209 Wis.2d at 689-91 (quoting O'Reilly & Strasser, *supra*)

Another state-court opinion provides a valuable outline of the issues facing this Court in the case at bar. In *Swanson v. Roman Catholic BIshop of Portland,* 692 A.2d 441 (Me. 1997), Maine's highest court considered the issue of whether tort liability could be imposed against the church for negligent supervision of a priest. The court held that the plaintiffs' claim was barred by constitutional principles. *Id.* at 444. The *Swanson* court stated:

> When a civil court undertakes to compare the relationship between a religious institution and its clergy with the agency relationship of the business world, **secular duties are necessarily introduced into the ecclesiastical relationship and the risk of constitutional violation is evident.**

Id. The court reasoned that the principles of agency and actual authority involved in the plaintiffs' claim required an examination of religious law and useage regarding the church's authority over the priest. The court noted the important point that canon law severely restricted the ability of the church to remove, transfer and supervise the priest, and found that the First Amendment precluded an inquiry into the allocation of power within a heirarchical church. *Id.*

The court acknowledged that some other courts had allowed negligent supervision claims against churches if the facts required no interpretation of church doctrine. However, the *Swanson* court found that an inquiry into the ecclesiastical relationship between the priest and the Catholic Church was unconstitutional:

> Even assuming that the trial court could discern the existence of actual authority without determining questions of church doctrine or polity or could base the requisite agency relationship on apparent auth-

> **ority, constitutional obstacles remain. The imposition of secular duties and liability on the church as a "principal" will infringe upon its right to determine the standards governing the relationship betweek the church, its bishop, and the parish priest.**

Id. at 444-45.

The court also rejected those cases where the claim was allowed to proceed if the defendant had allegedly received notice that an individual clergyman was potentially dangerous. The court concluded that imposing a secular duty of supervision on the church would restrict the church's freedom to adhere to its ecclesiastical procedures. *Id.* at 445.

The Oklahoma Supreme Court has not ruled on the issue of whether the First Amendment precludes claims for employment-related liability against an ecclesiastical religious institution. *N.H. v. Presbyterian Church (U.S.A.)*, 1999 OK 88, ¶26 (First Amendment analysis unnecessary in case involving pastoral sexual misconduct because underlying facts supported no employment-related liability against church); *Bladen v. First Presbyterian Church*, 857 P.2d 789, 797 (Okla. 1993) (Because plaintiffs' claims against minister were not cognizable, employment-related claims against church were not viable and First Amendment analysis was not reached).[4]

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[4]However, in *N.H. v. Presbyterian Church, supra*, the Honorable Nancy Coats of the Seventh Judicial District of the State of Oklahoma granted summary judgment on the grounds that the plaintiff's claims against the church were barred by the First Amendment. (A copy of the Judgment entered in that case is attached as Exhibit "A") On appeal, the Supreme Court affirmed the trial court's dismissal of the plaintiff's case on other grounds. (*See* discussion of *respondeat superior, supra.*) Nonetheless, Judge

[footnote continued]

However, the Oklahoma Supreme Court has held that the First Amendment prohibits the government from imposing its own ideas on the religious organization. *Guinn v. Church of Christ of Collinsville, supra,* 775 P.2d 766, 772 (Okla. 1989) (under the First Amendment people may freely consent to being spiritually governed by an established set of ecclesiastical tenets defined and carried out by those chosen to interpret and impose them.)

In the present action, to determine Plaintiffs' claims, this Court must necessarily evaluate and interpret the policies and practices of the Oblates and its internal organization. However, federal and state courts have repeatedly acknowledged the central fact that the governance of clergy within the Catholic religion is controlled by fundamental religious beliefs and church doctrine. Application of traditional tort principles of agency and employment-related liability in the present case would result in excessive entanglement between church and state. Such judicial scrutiny would inhibit religious freedom, and would ultimately result in state endorsement of one approved method of religious organization over another. The Free Exercise Clause of the First Amendment prohibits a state civil court from adjudicating the matters set forth in the present case.

C. ALLEGATIONS OF NOTICE OR KNOWLEDGE DO NOT CORRECT THE CONSTITUTIONAL INFIRMITIES OF PLAINTIFFS' CLAIM

Plaintiffs will undoubtedly place great emphasis upon the issue of notice, and urge that the allegations of

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Coats was obviously persuaded by the constitutional argument, and granted summary judgment in favor of the defendant on all claims and causes of action.

knowledge on the part of the Oblates open the door for state scrutiny of the ecclesiastical relationship at issue. Plaintiffs' claim requires this Court to evaluate the knowledge and conduct of the Oblates and determine whether the church should, in some situations, abandon its traditional norms regarding the selection of clergy.

However, a civil court or jury is not permitted to discard an established ecclesiastical policy and impose its own judgment about what is appropriate. Even when faced with emotional issues such as sexual misconduct, the courts recognize the constitutional ramifications of reviewing and ruling upon clerical governance. Whether or not the Plaintiffs allege prior knowledge in their petition, the basic fact remains that religious belief and doctrinal policy control the mannerin which a priest is called and allowed to serve.

The Plaintiffs' allegations of knowledge and notice make no impact upon the constitutional barrier which removes this case from the subjec matter jurisdiction of this Court. This principle is established in *Ayon v. Gourley,* 47 F.Supp.2d 1246 (Colo. Dist. Ct. 1998). There, the Archdiocese was sued for damages arising from sexual abuse by a priest. The plaintiff alleged that the Archdiocese had prior notice of the priest's propensities, and therefore asserted a claim for negligent hiring and supervision, ad well as a claim for outrageous conduct. The court found that dismissal of the petition would be proper because a consideration of *any of the claims* against the Archdiocese would be unconstitutional. *Id.* at 1251. The court specifically stated that the outrageous conduct claim, where the plaintiff claimed that church defendants acted with knowledge, could not open the door for judicial scrutiny of church procedures:

> [T]he analysis of this claim for First Amendment purposes would appear to be very similar to that for the negligent supervision claim. The difference, of course, is the intentional nature of the act. **This difference does not change the fact that it is the Archdiocese Defendants' oversight riles with regard to [the priest] that would have to be considered to determine if their conduct was appropriate. Whether examined for negligence or intent, it is the Archdiocese Defendants' actions in supervising [the priest] which would be at issue for both claims.**
>
> * * *
>
> The court finds that the result is the same for the negligent supervision and outrageous conduct claims. . . . [T]he procedures that the Archdiocese Defendants have in place regarding supervision would have to be examined to determine whether they were reasonable and adequate. **This would clearly be inappropriate governmental involvement and a burden on these Defendants' exercise of religion. Consequently, Plaintiff's claims against the Archdiocese Defendants must be dismissed as violative of the First Amendment.**

Similarly, in *Swanson v. Roman Catholic Bishop of Portland, supra,* 692 A.2d 441, the court rejected the position that a claim could proceed if the defending church had knowledge that an individual clergyman was potentially dangerous:

> We conclude, however, that **these few courts have failed to maintain the appropriate degree of neutrality required by the United States and Maine Constitutions.** Although "[t]he Supreme Court has consistently recognized that the religion clauses are subject to a balancing of interests test," the Court "has also concluded that certain civil rights

> protected in secular settings are not sufficiently compelling to overcome certain religious interests." We conclude that, on the facts of this case, **imposing a secular duty of supervision on the church and enforcing that duty through civil liability would restrict its freedom to interact with its clergy in the manner deemed proper by ecclesiastical authorities** and would not serve a societal interest sufficient to overcome the religious freedoms inhibited.

Id. at 445 (citing *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354 (D.C.Cir. 1990)).

The case law discussed in this brief repeatedly acknowledges that a priest's supervisors are very limited in their power to control or remove him from his service in the church. The concepts of knowledge, forgiveness, confession and redemption are deeply and inextricably intertwined in the Catholic religion. These beliefs are tightly woven together, and one cannot pluck a single thread from the tapestry of concepts that is Catholicism and expect that thread to mesh with the secular weave of employment-related tort law.

Even the mere argument that the defendants' knowledge and subsequent actions somehow qualify the case for judicial scrutiny requires a court to make a threshold interpretation of religious doctrine.[5] At what point

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[5]Even at seemingly surface-level analysis, governmental interpretation of religious policy has been avoided by the courts as excessive entanglements. In *Lemon v. Kurtzman*, 403 U.S. 602, 619-620, 91 S.Ct. 2105, 2114-15 (1971), the Court reviewed the system used to determine whether a religious school could receive state financial aid:

> The statute excludes teachers employed by nonpublic schools whose average per-pupil expenditures on secular

[footnote continued]

should the ecclesiastical regime set aside the canons of the church and mold its behavior to comply with common-law tort principles? Every judge and juror in the land will have a different opinion about this issue. Every jurisdiction will apply a different standard of conduct.

The Plaintiffs' allegations regarding knowledge and notice on the part of the Oblates do not open the door to judicial review of the Oblates' relationship with its clergy. The concept of religious autonomy must be uniformly applied in all cases which seek to weaken the wall between church and state. The basic fact must not be lost that the Plaintiffs' claim, however emotional and informmatory, is barred by the Constitution and must be dismissed as a matter of law. Even passion and righteousness on the part of the judiciary and the lawyers must be tempered so as to avoid the slippery slope of governmental entanglement.

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education equal or exceed the comparable figures for public schools. In the event that the total expenditures of an otherwise eligible school exceed this norm, the program requires the government to examine the school's records in order to determine how much of the total expenditures is attributable to secular education and how much to religious activity. This kind of state inspection and evaluation of the religious content of a religious organizationis fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches. The Court noted 'the hazards of government supporting churches' in *Walz v. Tax Commission*, 397 U.S., at 675, 90 S.Ct., at 1414, and we cannot ignore here the danger that pervasive modern governmental power will ultimately intrude on religion and thus conflict with the Religion Clauses. *Lemon v. Kurtzman*, 403 U.S. 602, 619-620, 91 S.Ct. 2105 (1971)

III. CONCLUSION

The claim set forth in Plaintiffs' Fourth Amended Petition based upon the doctrine of *respondeat superior* fails to state a claim against this Defendant for which relief may be had. The priest's actions were outside the scope of any employment relationship he may have had with the Oblates, and as such vicarious liability cannot be imposed upon the Oblates for such actions.

Plaintiffs also ask this Court to impose tort liability for the manner in which the Oblates hired, trained and supervised the priest. In so doing, Plaintiffs' quest requires the state to create and impose a legal duty on a religious institution regarding the manner in which priests are called and ordained. To adjudicate Plaintiffs' case, this Court must fabricate a "reasonable Oblate Provincial" standard of conduct. In order to impose liability, the Court must apply that fabricated standard to doctrinal concepts such as mercy and redemption which are intertwined in the rules of the Catholic ecclesiastical organization. A secular court's analysis of those religious beliefs in the context of a civil lawsuit violates the basic mandate of the First Amendment. Traditional tort pcinciples simply cannot be applied to the religious mechanism by which clergy are called into service without breaching the Constitutional wall separating the church and the state.

WHEREFORE, Defendant, Oblates of St. Francis de Sales, pursuant to the provisions of the First Amendment of the United States Constitution, Article I, Section Two of the Oklahoma Constitution, and 12 Okla. Stat. §2012, respectfully requests this Court to dismiss Plaintiffs' lawsuit on the grounds that subject matter jurisdiction is lacking, and that the Plaintiffs have failed to state a claim upon which relief may be granted.

Respectfully submitted,

/s/ David C. Johnston, Jr.
David C. Johnston, Jr. OBA #004733
Debra A. Charles OBA #15936
Chubbuck Smith Rhodes Stewart & Elder
119 N. Robinson, Suite 820
Oklahoma City, OK 73103
Telephone: (405) 236-8282
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ATTORNEYS FOR OBLATES
Of ST. FRANCIS de SALES

Of Counsel:
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1000 Jackson
Toledo, Ohio 43624-1573

[Certificate of Service Omitted in Printing]

APPENDIX H

IN THE DISTRICT COURT
WITHINAND FOR OKLAHOMA COUNTY,
STATE OF OKLAHOMA

Case No. CJ-99-6829-65

C.J., a minor,
by and through his parents and next of friends,
JIMMIE BARTLETT JOHNSON, JR. and
PAMELA GAYLE JOHNSON and JIMMIE
BARTLETT JOHNSON, JR., individually and
PAMELA GAYLE JOHNSON, individually,

Plaintiffs,

vs.

JAMES FRANCIS RAPP, individually,
OBLATES OF ST. FRANCIS de SALES, and
ARCHDIOCESE OF OKLAHOMA CITY,

Defendants.

FIRST DISCOVERY REQUESTS TO DEFENDANT

TO: *OBLATES OF ST. FRANCIS de SALES*
c/o David C. Johnston, Jr.
CHUBBUCK, SMITH & RHODES
Robinson, Renaissance, Suite 820
119 North Robinson Avenue
Oklahoma City, Oklahoma 73102

Pursuant to the Oklahoma Discovery Code, 12 O.S. §3224 et seq., Plaintiff submits the following discovery

requests to Defendant. As used herein, the term "you" or "your" includes you personally and, additionally, any agent, attorney, accountant, consultant or other person acting or purporting to act for you or on your behalf, whether now or formerly. "Communication" includes any contact, oral, written, electronic or otherwise, by which information is conveyed and includes e-mail transmitted electronically, memoranda referring or relating to oral or other communication, whether made before, during or after such communication occurred.

In the event that privilege (including work product) is claimed concerning any question or request made herein, please describe the nature of the privilege claimed; provide the name of the person with whom such privilege is claimed; describe the information sufficiently to identify and explain the basis for the privilege claimed; and if a document is claimed to be privileged state and present location of the same and the names, addresses and telephone number of each person who has seen the document before the date of these discovery requests.

REQUESTS FOR ADMISSION

Pursuant to 12 O.S. §3236, Plaintiff requests that Defendant admit, for purposes of this action only, that the following statements or opinions of fact, or of the application of law to fact, including the genuineness of any documents described in the following, are true (any such documents are either attached or have been previously supplied to Defendant). In accordance with said statute, the requests contained herein are deemed admitted unless, within forty-five (45) days following your receipt of these requests, you serve upon Plaintiff's undersigned attorney of record a written answer or objec-

tion addressed to the matter, signed by you or your attorney.

Request For Admission No. 1: Admit or deny that individual members of the Order of the Oblates of St. Francis de Sales who were superior to James Francis Rapp were made aware of allegations of the sexual misconduct of James Francis Rapp while he was under contract at Lumen Christi High School.

Request For Admission No. 2: Admit or deny that the Father Provincial, superior to James Francis Rapp, was made aware of allegations of sexual misconduct of James Francis Rapp while he was assigned to Lumen Christi High School in Jackson, Michigan.

Request For Admission No. 3: Admit or deny that the Order of the Oblates of St. Francis de Sales was made aware of allegations of sexual misconduct by James F. Rapp while he was assigned to Lumen Christi High School in Jackson, Michigan.

Request For Admission No. 5: Admit or deny that Father Alfred J. Russell was assigned to Lumen Christi High School as principal at the time that James F. Rapp was accused of sexual misconduct.

Request For Admission No. 6: Admit or deny that Father Alfred J. Russell was responsible for relieving James F. Rapp of his duties at Lumen Christi High School.

Request For Admission No. 7: Admit or deny that Alfred J. Russell, of the Oblates of St. Francis de Sales, was Provincial to the Toledo-Detroit Province in July of 1987.

Request For Admission No. 8: Admit or deny that Alfred J. Russell, of the Oblates of St. Francis de Sales, notified James F. Rapp that the Provincial Council

approved James F. Rapp's assignment to St. Raphael's in Naperville, Illinois.

Request For Admission No. 9: Admit or deny that the Order of the Oblates of St. Francis de Sales was made aware of civil actions filed in the State of Michigan regarding alleged sexual misconduct of James F. Rapp, while assigned to Lumen Christi High School in Jackson, Michigan.

Request For Admission No. 10: Admit or deny that the Order of the Oblates of St. Francis de Sales was named a defendant in a civil litigation filed in Michigan because of the alleged sexual misconduct of James Francis Rapp.

Request For Admission No. 11: Admit or deny that James F. Rapp was treated for ephebophilia at the direction of the Oblates of St. Francis de Sales in 1986.

Request For Admission No. 12: Admit or deny that Frank Valcour, M.D., examined and treated James Francis Rapp at the Direction of Oblates of St. Francis de Sales.

Request For Admission No. 13: Admit or deny that James F. Rapp was treated at St. Luke's Institute, 2420 Brooks Drive, Suitland, Maryland, at the direction of the Oblates of St. Francis de Sales.

Request For Admission No. 14: Admit or deny that the Oblates of St. Francis de Sales received, in October, 1986, correspondence from Dr. Frank Valcour regarding examination and treatment of James Francis Rapp.

Request For Admission No. 15: Admit or deny that Rev. Paul Grehl, who had been Provincial of the Oblates of St. Francis de Sales, was made aware of the treatment James Francis Rapp received from Dr. Frank Valcour.

Request For Admission No. 16: Admit or deny that some of the superiors of James Francis Rapp, who were also members of the Order of the Oblates of St. Francis de Sales, were aware that James Francis Rapp, prior to 1990, was involved in deviant sexual behavior.

Request For Admission No. 17: Admit or deny that the Oblates of St. Francis de Sales advised individuals employed by and/or clerics in the Archdiocese of Oklahome City, that James Francis Rapp had been accused of acts of sexual misconduct with teenage boys.

Request For Admission No. 18: Admit or deny that James Francis Rapp has been treated for sexual misconduct in the form of ephebophilia or pedophilia on more than one occasion and that said treatment was paid for by the Oblates of St. Francis de Sales or an insurance carrier, with premiums paid for by the Oblates.

Request For Admission No. 19: Admit or deny that in March of 1959, a report was received at the Novitiate House, of the Oblates of St. Francis de Sales, that James F. Rapp had strng homosexual tendencies.

Request For Admission No. 20: Admit or deny that in March of 1959, Dr. Joseph F. Jastak provided the Superior, of Notiviates House of the Oblates of St. Francis de Sales, information that James F. Rapp experienced deviate sexual arousal.

Request For Admission No. 21: Admit or deny that the Oblates of St. Francis de Sales allowed James F. Rapp to be assigned to Assumption Catholic Church without revealing allegations of James F. Rapp's sexual misconduct to the Parishioners in Duncan, Oklahoma.

Dated January 6th, 2000.

STUART, FRIEDA & HAMMOND, P.C.
By: /s/ James M. Frieda
James M. Frieda OBA #3143
John M. Stuart, OBA #8709
Court Plaza Building
1111 West Willow, Suite 100
Duncan, Oklahoma 73533
Telephone (580) 252-9033
Facsimile (580) 252-6251

ATTORNEYS FOR PLAINTIFFS

[Certificate of Service Omitted in Printing]

APPENDIX I

IN THE DISTRICT COURT
WITHINAND FOR OKLAHOMA COUNTY,
STATE OF OKLAHOMA

Case No. CJ-99-6829-65

C.J., a minor,
by and through his parents and next of friends,
JIMMIE BARTLETT JOHNSON, JR. and
PAMELA GAYLE JOHNSON and JIMMIE
BARTLETT JOHNSON, JR., individually and
PAMELA GAYLE JOHNSON, individually,

Plaintiffs,

vs.

JAMES FRANCIS RAPP, individually,
OBLATES OF ST. FRANCIS de SALES, and
ARCHDIOCESE OF OKLAHOMA CITY,

Defendants.

FIRST REQUEST FOR
PRODUCTION OF DOCUMENTS

TO: *OBLATES OF ST. FRANCIS de SALES*
c/o David C. Johnston, Jr.
CHUBBUCK, SMITH & RHODES
Robinson, Renaissance, Suite 820
119 North Robinson Avenue
Oklahoma City, Oklahoma 73102

Pursuant to the Oklahoma Discovery Code (12 O.S., Section 3234), Plaintiffs and hereby requests Defendant, OBLATES OF ST. FRANCIS de SALES, to produce the documents designated below at the office of STUART, FRIEDA & HAMMOND, P.C., Court Plaza Building, 1111 West Willow, Suite 100, Duncan, Oklahoma, Attorneys for Plaintiff, on or before the next business day following the expiration of thirty (30) days after the receipt of this request.

DEFINITIONS

As used in this Request for Production the following terms shall have the meaning set out below, unless the context is clearly to the contrary:

(a) As used in this Request, any reference to Defendant and/or OBLATES OF ST. FRANCIS de SALES includes any agent, attorney, accountant, consultant or other person acting or purporting to act for or on behalf of the Oblates of St. Francis de Sales whether now or formerly.

(b) "Person" means any individual, proprietorship, partnership, association, corporation, joint venture, agency, board, authority, commission, government entity, or other similar entity.

(c) "Document", "record" or "report", as used herein, shall mean every paper, electronic or other record, regardless of origin or location, whether sent or received or made or used internally, in whatever form, in your possession, custody or control or prepared by or for you, including, without limitation, printed, typed or handwritten materials, letters, correspondence, memoranda, interoffice communications, minutes of meetings, bulletins, reports, specifications, telegrams, notes, notebooks,

scrapbooks, diaries, work sheets, summaries, transcripts, contracts, exhibits, to contracts, records, purchase orders, invoices, delivery receipts, computer sheets, cards or printouts, drawings, graphs, tables, charts, photographs or sound recordings, tape or other electronic or electromagnetic recordings and instructions, and shall include drafts, non-final versions or non-identical copies of any of the foregoing.

(d) "Communication" shall mean any contact, oral or written, formal or informal, at any time or place, under any circumstances, in any manner, whereby a statement of any nature is transmitted or transferred, and shall include, without limitation, any documents containing, constituting, reflecting, memorializing, referring or relating to any such contact made.

(e) The word "or" means "and/or" and should be read both ways so as to encompass both constructions and calls for documents to be provided responsive to both constructions.

(f) "You" or "your" refers to the party responding to this request. Where documents in the possession of a party are requested, such request includes documents in the possession of the party's agents, representatives, and unless privileged, their attorneys.

(g) The terms "identify" or "identify of" a person are defined to mean a demand for the full name, address, residence address, present business address and job title, or such person at the time of the events referred to, together with a statement as to his/her relationship with the Respondent, if any, and if not presently related, a statement as to whether any such relationship ever existed and inclusive dates thereof.

(h) The term "identify" or "identify of" a person other than an individual is defined to mean a demands

for its name, its address, its principal activity, and the name, address and then existing job classification of each of its agents who acted for it with respect to matters referred to in this Request.

(l) The term "laws" means all ordinances, statutes, rules, regulations, orders, injunctions, writs or decrees of any government or political subdivision or agency thereof, or any court or similar entity established by any thereof.

INSTRUCTIONS

1. Documents with respect to which privilege is claimed (privilege as used herein shall include work products) shall be sufficiently described so that the Petitioners can bring the question of privilege before the Court. Documents shall be deemed to be sufficiently described for these purposes if the following information is provided by affidavit:

(a) The nature of privilege claimed;

(b) The identity of any person(s) supplying the information on which the document is based;

(c) The date the document was prepared, its title, the type of document (e.g., letter, memo, etc.), author, addresses and number of pages;

(d) The present locations of the documents;

(e) The name of each person (other than stenographic or clerical assistants) participating in its preparation;

(f) The name and position of each person, other than attorneys representing you, to whom the contents of the document have been communicated by copy, exhibition, reading or summarization; and

(g) A brief description of the contents of the document sufficient to explain the privilege claimed.

2. With respect to this request for production, gender is to be disregarded.

3. This request calls for documents, records, or reports written or created after *January 1, 1959, unless otherwise specified.*

4. If any requested document was, but is no longer, in your possession or subject to your control or in existence, state whether it is:

(a) Missing or lost, identifying its last known location, and the date it was at that location, and describe in detail the circumstances under which it came to be missing or lost;

(b) Destroyed, identifying the date of its destruction, the person(s) who authorized and/or carried out its destruction, and describing in detail the circumstances of its destruction;

(c) Transferred, voluntarily or involuntarily, to others, identifying its present location and custodian, and describing in detail the date and circumstances of its transfer, including the identification of the person authorizing its transfer; or

(d) Otherwise disposed of, stating its disposition, the date thereof, and describing in detail the circumstances of its disposition.

REQUEST FOR PRODUCTION

1) Any and all personnel records of James F. Rapp from 1959 through December, 1999.

2) Any and all documents or records which contain information that James F. Rapp experiences strong homosexual impulses.

3) Any and all documents or records which contain information that the Order of St. Francis de Sales was made aware that James F. Rapp became sexually aroused by items of clothing or shoes.

4) Any and all documents or records that contain comments or recommendations that James F. Rapp be given psychological treatment or testing before being allowed to take vows or that his ordination be delayed.

5) Any and all documents or records reflecting allegations of sexual misconduct on the part of James F. Rapp while he was assigned to Lumen Christi High School in Jackson, Michigan.

6) Any and all documents or records reflecting the assignment or assignments and place of residence of James F. Rapp from the time he left Lumen Christi High School until assigned to St. Raphael's Parish in Naperville, Illinois.

7) Any and all correspondences, records, documents or writings from the Oblates of St. Francis de Sales to the Office of the Bishop of Joliet, Office of Chancery of Joliet, the Vicar General or any other person employed by the Diocese of Joliet advising that James F. Rapp had been treated for any type of sexual misconduct.

8) Any and all corespondences, records, documents or writings from the Oblates of St. Francis de Sales to the Office of the Bishop of Joliet, Office of Chancery of Joliet, the Vicar General or any other person employed by the Diocese of Joliet advising that the Oblates of St. Francis de Sales would assume full liability or responsibility for misconduct of James F. Rapp.

9) Any and all reports provided by Dr. Frank Valcour to the Oblates regarding treatment of James F. Rapp.

10) Any and all documents, policies and/or procedures initiated by the Oblates of St. Francis de Sales to insure that James F. Rapp refrain from or not be allowed to engage in acts of sexual misconduct.

11) Any and all documents, policies, procedures or writings which indicate a method of reporting sexual misconduct of a member of the Order of the Oblates of St. Francis de Sales to other religious organizations to which the individual is subsequently assigned or employed by.

12) Any and all documents, policies, procedures or writings of which the Oblates are in possession which have been initiated by other religious organizations which outline or direct a reporting procedure to any and all other religious organizations, schools, parishes or religious corporations, of alleged sexual misconduct of a member of the Oblates asking that they notify other religious groups.

13) Any and all documents, writings, notes or correspondences which reflect policies that have been put in place by the Catholic Church as those policies relate to reporting allegations of sexual misconduct committed by clerics to other religious organizations and to law enforcement authorities.

14) Any and all documents which reflect policies established by the Oblates of St. Francis de Sales from 1985 through 1990 as those policies relate to reporting allegations of sexual misconduct committed by members of the Order to other religious organizations and to law enforcement authorities.

15) Any and all documents which reflect policies established by the Oblates of St. Francis de Sales from 1990 through 1995 as those policies relate to reporting allegations of sexual misconduct committed by members of the Order to other religious organizations and to law enforcmeent authorities.

16) Any and all documents which reflect policies established by the Oblates of St. Francis de Sales from 1995 through 1999 as those policies relate to reporting allegations of sexual misconduct committed by members of the Order to other religious organizations and to law enforcement authorities.

17) Any and all documents indicating why James F. Rapp was reassigned from St. Raphael's Parish in Naperville, Illinois to the Archdiocese of Oklahoma City.

18) Any and all documents from the Diocese of Joliet to the Diocese of Oklahoma City regarding the transfer of James F. Rapp from Naperville, Illinois to the Archdiocese of Oklahoma City.

19) Any and all documents, writings, notes or correspondences from any member of the Order of the Oblates of St. Francis de Sales or employees of the Oblates of St. Francis de Sales to the Archdiocese of Oklahoma City, Archbishop of Oklahoma City, dealing with the reassignment of James F. Rapp from St. Raphael's Parish in Naperville, Illinois to the Archdiocese of Oklahoma City.

20) Any and all correspondences wherein the Order of the Oblates of St. Francis de Sales communicated to the Archdiocese of Oklahoma City, Archbishop Salatka or his successor, that James F. Rapp had received treatment for any sexual misconduct.

21) Any and all correspondences from the Order of the Oblates of St. Francis de Sales, any of its members or any employee to the Archdiocese of Oklahoma City, its Bishop or its employees, regarding any lawsuits which had been initiated naming the Oblates of St. Francis de Sales or James F. Rapp as Defendants due to the alleged sexual misconduct of James F. Rapp.

22) Any and all correspondences, books, records, writings or notes provided by the Oblates of St. Francis de Sales, its members, its employees, to the Archdiocese of Oklahoma City, the Archbishop of the Diocese of Oklahoma City, or any employee of the Diocese regarding the treatment or counseling received by James F. Rapp due to sexual misconduct.

23) Any and all correspondences, records, writings, books or notes in possession of the Order of the Oblates of St. Francis de Sales, which indicates any and all instances of sexual misconduct on the part of James F. Rapp from 1959 through 1999.

Dated January 20th, 2000.

STUART, FRIEDA & HAMMOND, P.C.

By: /s/ James M. Frieda
James M. Frieda OBA #3143
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APPENDIX J

[Filed APR 7 2000]

IN THE DISTRICT COURT
WITHIN AND FOR OKLAHOMA COUNTY
STATE OF OKLAHOMA

Case No. CJ-99-6364-65

C.J., a minor, by and through his parents and next of friends, JIMMIE BARTLETT JOHNSON, JR., and PAMELA GAYLE JOHNSON and JIMMIE BARTLETT JOHNSON, JR., individually and PAMELA GAYLE JOHNSON, individually,

Plaintiffs,

vs.

JAMES FRANCIS RAPP, individually, OBLATES OF ST. FRANCIS de SALES, ARCHDIOCESE OF OKLAHOMA CITY, REVEREND CHARLES A. SALATKA, REVEREND EUSEBIUS J. BELTRAN, and REVEREND ALFRED J. RUSSELL,

Defendants.

PLAINTIFFS' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS TO DEFENDANT ARCHDIOCESE OF OKLAHOMA CITY

TO: *ARCHDIOCESE OF OKLAHOMA CITY*
c/o Mr. Kent Fleming
1215 Classen Drive

P.O. Box 60130
Oklahoma City, OK 73146
Attorneys for Defendants
Archdiocese of Oklahoma City
Reverend Charles A. Salatka
and Reverent Eusebius J. Beltran

Pursuant to the Oklahoma Discovery Code (12 O.S., Section 3234), Plaintiffs and hereby requests Defendant, ARCHDIOCESE OF OKLAHOMA CITY, to produce the documents designated below at the office of STUART, FRIEDA & HAMMOND, P.C., Court Plaza Building, 1111 West Willow, Suite 100, Duncan, Oklahoma, Attorneys for Plaintiff, on or before the next business day following the expiration of thirty (30) days after the receipt of this request.

DEFINITIONS

As used in this Request for Production, the following terms shall have the meaning set out below, unless the context is clearly to the contrary:

(a) As used in this Request, any reference to Defendant and/or ARCHDIOCESE OF OKLAHOMA CITY, includes any agent, attorney, accountant, consultant or other person acting or purporting to act for or on behalf of the Archdiocese of Oklahoma City whether now or formerly.

(b) "Person" means any individual, proprietorship, partnership, association, corporation, joint venture, agency, board, authority, commission, government entity, or other similar entity.

(c) "Document", "record" or "report", as used herein, shall mean every paper, electronic or other record, regardless of origin or location, whether sent or received

or made or used internally, in whatever form, in your possession, custody or control or prepared by or for you, including, without limitation, printed, typed or handwritten materials, letters, correspondence, memoranda, interoffice communications, minutes of meetings, bulletins, reports, specifications, telegrams, notes, notebooks, scrapbooks, diaries, work sheets, summaries, transcripts, contracts, exhibits, to contracts, records, purchase orders, invoices, delivery receipts, computer sheets, cards or printouts, drawings, graphs, tables, charts, photographs or would recordings, tape or other electronic or electromagnetic recordings and instructions, and shall include drafts, non-final versions or non-identical copies of any of the foregoing.

(d) "Communication" shall mean any contact, oral or written, formal or informal, at any time or place, under any circumstances, in any manner, whereby a statement of any nature is transmitted or transferred, and shall include, without limitation, any documents containing, constituting, reflecting, memorializing, referring or relating to any such contact made.

(e) The word "or" means "and/or" and should be read both ways so as to encompass both constructions and calls for documents to be provided responsive to both constructions.

(f) "You" or "your" refers to the party responding to this request. Where documents in the possession of a party are requested, such request includes documents in the possession of the party's agents, representatives, and unless privileged, their attorneys.

(g) The terms "identify" or "identify of" a person are defined to mean a demand for the full name, address, residence address, present business address and job title, or such person at the time of the events referred to,

together with a statement as to his/her relationship with the Respondent, if any, and if not presently related, a statement as to whether any such relationship ever existed and inclusive dates thereof.

(h) The term "identify" or "identify of" a person other than an individual is defined to mean a demands for its name, its address, its principal activity, and the name, address and then existing job classification of each of its agents who acted for it with respect to matters referred to in this Request.

(l) The term "laws" means all ordinances, statutes, rules, regulations, orders, injunctions, writs or decrees of any government or political subdivision or agency thereof, or any court or similar entity establish by any thereof.

INSTRUCTIONS

1. Documents with respect to which privilege is claimed (privilege as used herein shall include work products) shall be sufficiently described so that the Petitioners can bring the question of privilege before the Court. Documents shall be deemed to be sufficiently described for these purposes if the following information is provided by affidavit:

(a) The nature of privilege claimed;

(b) The identity of any person(s) supplying the information on which the document is based;

(c) The date the document was prepared, its title, the type of document (e.g., letter, memo, etc.), author, addressee and number of pages;

(d) The present locations of the documents;

(e) The name of each person (other than stenographic or clerical assistants) participating in its preparation;

(f) The name and position of each person, other than attorneys representing you, to whom the contents of the document have been communicated by copy, exhibition, reading or summarization; and

(g) A brief description of the contents of the document sufficient to explain the privilege claimed.

2. With respect to this request for production, gender is to be disregarded.

3. This request calls for documents, records, or reports written or created after *January 1, 1959, unless otherwise specified.*

4. If any requested document was, but is no longer, in your possession or subject to your control or in existence, state whether it is:

(a) Missing or lost, identifying its last known location, and the date it was at that location, and describe in detail the circumstances under which it came to be missing or lost;

(b) Destroyed, identifying the date of its destruction, the person(s) who authorized and/or carried out its destruction, and describing in detail the circumstances of its destruction;

(c) Transferred, voluntarily or involuntarily, to others, identifying its present location and custodian, and describing in detail the date and circumstances of its transfer, including the identification of the person authorizing its transfer; or

(d) Otherwise disposed of, stating its disposition, the date thereof, and describing in detail the circumstances of its disposition.

REQUEST FOR PRODUCTION

1) Any and all personnel records of James F. Rapp from 1959 through December, 1999.

2) Any and all documents or records which contain information that James F. Rapp experiences strong homosexual impulses.

3) Any and all documents or records which contain information that the Archdiocese of Oklahoma City was made aware that James F. Rapp became sexually aroused by items of clothing or shoes.

4) Any and all documents or records that contain comments or recommendations that James F. Rapp be given psychological treatment or testing before being allowed to take vows or that his ordination be delayed.

5) Any and all documents or records reflecting allegations of sexual misconduct on the part of James F. Rapp while he was assigned to Lumen Christi High School in Jackson, Michigan.

6) Any and all documentation or records reflecting the assignment or assignments and place of residence of James F. Rapp from the time he left Lumen Christi High school until assigned to St. Raphael's Parish in Naperville, Illinois.

7) Any and all correspondences, records, documents or writings from the Oblates of St. Francis de Sales to the Office of the Bishop of Joliet, Office of Chancery of Joliet, the Vicar General or any other person employed by the Diocese of Joliet advising that James F. Rapp had been treated for any type of sexual misconduct.

8) Any and all correspondences, records, documents or writings from the Oblates of St. Francis de Sales to the Office of the Bishop of Joliet, Office of Chancery of

Joliet, the Vicar General or any other person employed by the Diocese of Joliet advising that the Oblates of St. Francis de Sales would assume full liability or responsibility for misconduct of James F. Rapp.

9) Any and all documents, policies and/or procedures initiated by the Archdiocese of Oklahoma City to insure that cleric refraom from or not be allowed to engage in acts of sexual misconduct.

10) Any and all reports provided by Dr. Frank Valcour to the Oblates regarding treatment of James F. Rapp.

11) Any and all documents, policies and/or procedures initiated by the Oblates of St. Francis de Sales and/or Archdiocese of Oklahoma City to insure that James F. Rapp refrain from or not be allowed to engage in acts of sexual misconduct.

12) Any and all documents, policies, procedures or writings which indicate a method of reporting sexual misconduct of a member of the Archdiocese of Oklahoma City to other religious organizations to which the individual is subsequently assigned or employed by.

13) Any and all documents, policies and/or procedures initiated by the Diocese to insure that clerics or laypersons working with youth or youth related activities not be allowed to engage in sexual misconduct or spend time alone with children, adolescents or young adults.

14) Any and all policies which require signatures of individuals working with youth related activities, acknowledging that the policy related to insure that clerics or laypersons working with youth or youth related activities not be allowed to engage in sexual misconduct or spend time alone with children, adolescents or young adults have been read and understood.

15) Any and all documents, policies, procedures or writings of which the Oblates are in possession which have been initiated by other religious organizations which outline or direct a reporting procedure to any and all other religious organizations, schools, parishes or religious corporations, of alleged sexual misconduct of a member of the Oblates and/or Archdiocese of Oklahoma City, asking that they notify other religious groups.

16) Any and all documents, writings, notes or correspondences which reflect policies that have been put in place by the Catholic Church and/or Archdiocese of Oklahoma City, as those policies relate to reporting allegations of sexual misconduct committed by clerics to other religious organizations and to law enforcement authorities.

17) Any and all documents which reflect policies established by the Oblates of St. Francis de Sales and/or Archdiocese of Oklahoma City, from 1985 through 1990 as those policies relate to reporting allegations of sexual misconduct committed by members of the Order to other religious organizations and to law enforcement authorities.

18) Any and all documents which reflect policies established by the Oblates of St. Francis de Sales and/or Archdiocese of Oklahoma City, from 1990 through 1995 as those policies relate to reporting allegations of sexual misconduct committed by members of the Order to other religious organizations and to law enforcement authorities.

19) Any and all documents which reflect policies established by the Oblates of St. Francis de Sales and/or Archdiocese of Oklahoma City, from 1995 through this date as those policies relate to reporting allegations of sexual misconduct committed by members of the Order

to other religious organizations and to law enforcement authorities.

20) Any and all documents indicating why James F. Rapp was reassigned from St. Raphael's Parish in Naperville, Illinois to the Archdiocese of Oklahoma City.

21) Any and all documents from the Diocese of Joliet to the Diocese of Oklahoma City regarding the transfer of James F. Rapp from Naperville, Illinois to the Archdiocese of Oklahoma City.

22) Any and all documents, writings, notes or correspondences from any member of the Order of the Oblates of St. Francis de Sales or employees of the Oblates of St. Francis de Sales to the Archdiocese of Oklahoma City, Archbishop of Oklahoma City, dealing with the reassignment of James F. Rapp from St. Raphael's Parish in Naperville, Illinois to the Archdiocese of Oklahoma City.

23) Any and all correspondences wherein the Order of the Oblates of St. Francis de Sales communicated to the Archdiocese of Oklahoma City, Archbishop Salatka or his successor, that James F. Rapp had received treatment for any sexual misconduct.

24) Any and all correspondences from the Order of the Oblates of St. Francis de Sales, any of its members or any employee to the Archdiocese of Oklahoma City, its Bishop or its employees, and/or any third party, regarding any lawsuits which had been initiated naming the Oblates of St. Francis de Sales or James F. Rapp as Defendants due to the alleged sexual misconduct of James F. Rapp.

25) Any and all correspondences, books, records, writings or notes provided by the Oblates of St. Francis de Sales, its members, its employees, to the Archdiocese of

Oklahoma City, the Archbishop of the Diocese of Oklahoma City, or any employee of the Diocese regarding the treatment or counseling received by James F. Rapp due to sexual misconduct.

26) Any and all correspondences, records, writings, books or notes in possession of the Order of the Oblates of St. Francis de Sales and/or Archdiocese of Oklahoma City, which indicates any and all instances of sexual misconduct on the part of James F. Rapp from 1959 through 1999.

Dated April 7th, 2000.

STUART, FRIEDA & HAMMOND, P.C.

By: [Illegible]
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ATTORNEYS FOR PLAINTIFFS

[Certificate of Service Omitted in Printing]

APPENDIX K

[Filed MAY 22 2000]

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

94730

JOHN DOE, individually;
OBLATES OF ST. FRANCIS de SALES;
THE ROMAN CATHOLIC CHURCH;
ARCHDIOCESE OF OKLAHOMA CITY;
REVEREND CHARLES A. SALATKA;
REVEREND EUSEBIUS J. BELTRAN;
and REVEREND ALFRED J. RUSSELL,

Petitioner,

vs.

HONORABLE NILES JACKSON,
JUDGE OF THE DISTRICT COURT OF OKLAHOMA
COUNTY, SEVENTH JUDICIAL DISTRICT,
OKLAHOMA,

Respondent.

PETITIONERS, ARCHDIOCESE OF OKLAHOMA CITY, REVEREND CHARLES A. SALATKA AND REVEREND EUSEBIUS J. BELTRAN'S, BRIEF IN SUPPORT OF APPLICATION FOR THE OKLAHOMA SUPREME COURT TO ASSUME ORIGINAL JURISDICTION AND PETITION FOR WRIT OF PROHIBITION

Petitioners, Archdiocese of Oklahoma City, Reverend Charles A. Salatka and Reverend Eusebius J. Beltran, would offer the following legal arguments and authorities in support of their application for this Court to assume original jurisdiction and issue a writ of prohibition.

LEGAL ARGUMENTS AND AUTHORITIES

PROPOSITION I

A WRIT OF PROHIBITION IS APPROPRIATE TO PROHIBIT THE USE OF UNAUTHORIZED OR EXCESSIVE JUDICIAL FORCE IN ENTERTAINING NON-ACTIONABLE CLAIMS WHICH CHILL FUNDAMENTAL FIRST AMENDMENT RIGHTS.

A.

This court has held that a writ of prohibition is appropriate in the exercise of supervisory control over inferior courts, to prohibit the use of unauthorized or excessive judicial force in entertaining non-actionable claims which chill First Amendment expression. *Gaylord Entertainment Co. v. Thompson,* 1998 OK 30 ¶5-6, 958 P.2d 128; *Brock v. Thompson,* 1997 OK 127 ¶46, 948 P.2d 279. See also, *Sabouri v. Hunter,* 596 P.2d 891, 892-93 (Okla. 1979); *Powell v. Seay,* 553 P.2d 161, 165 (Okla. 1976).

B.

The Exercise of First Amendment Rights Should Not Be Discouraged By The Threat Of Harassing Lawsuits.

In the above authority, the Oklahoma Supreme Court recognized the danger of the chilling affect on fundamental First Amendment rights, should non-actionable claims be allowed to go forward. The U.S. Supreme Court has long recognized the fact that the exercise of

First Amendment rights should not be discouraged by the threat of harassing lawsuits:

> "It would, therefore, be inappropriate and unconstitutional for this court to determine after the fact that ecclesiastical authorities negligently supervised or retained the defendant bishop. Any award of damages would have a chilling affect leading indirectly to state control over the future conduct of affairs of a religious denomination, as a result be violative of the text and history of the establishment clause." *Watson v. Jones,* 13 Wall. 679, 729, 20 L.Ed. 666 (1871).

Watson, supra, makes it abundantly clear that lawsuits direct against a legal religious organization, based upon a negligent supervision or retention cause of action, is violative of the First Amendment and does create a chilling affect on the exercise of religious liberties. Petitioners would urge that *Watson,* supra, is dispositive of the Plaintiffs' cause of action.

PROPOSITION II

TO FIND THERE IS SUBJECT MATTER JURISDICTION WOULD RUN COUNTER TO THE ORIGINAL INTENT OF THE FIRST AMENDMENT BY THE FOUNDING FATHERS.

This court has given particular credence to Thomas Jefferson's famous description of the essence of the First Amendment in his letter to the Danbury Baptists. See *Guinn v. Church of Christ of Collinsville,* 775 P.2d 766 770 (Okla. 1980). Jefferson's letter has become the cornerstone in the separation of church and state theory when interpreting the original intent of the First Amendment:

> "In contemplate with soversign reverence that act of the whole American people which declared that

> their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and state."

Later, Jefferson wrote in 1808 that the government is "interdicted by the Constitution from intermeddling with religious institutions, their doctrines, disciplines or exercises."[1]

The spirit of the First Amendment was first articulated by its primary author, James Madison, in June of 1775, urging that Virginia no longer have churches that supported involuntary taxation. The theme of separation of church and state appeared in the historic "Memorial and Remonstrance Against Religious Assessments" when Madison wrote:

> "We maintain, therefore, that in matters of religion, no man's right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance. . . . Because if religion can be exempt from the authority of society at large, still less, it can be subject to that of the legislative body. . . . The Rulers who are guilty of such encroachment [crossing the barrier between church and state], exceed the commission from which they derive their authority and are tyrants."[2]

Madison, when urging that the State of Virginia ratify the U.S. Constitution in June of 1788, said concerning

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[1] Letter of Thomas Jefferson to Rev. Samuel Miller, January 23, 1808.

[2] James Madison, "Memorial and Remonstrance Against Religious Assessments", June 20, 1785, *Library of America* (1999), p. 29, 30-31. See also, the discussion of Madison in *Dayton Christian Schools v. Ohio Civil Rights Com'n*, 766 F.2d 932, 949-50 n.30 (6th Cir. 1985).

the powers of the federal government in relation to religion: "There is not a shadow of right in the general government to intermeddle with religion. Its lease interference would be of most flagrant usurpation."[3]

After ratification of the Bill of Rights, Madison articulated his fears in a speech to Congress that the government had over-stepped the bounds of the First Amendment by singling out clergymen as a category in the census:

> "As to those employed in teaching and in inculcating the duties of religion, there may be some indelicacy in singling them out, as the general government is prescribed from interfering, in any manner whatsoever, in manners respecting religion; and it may be thought to do this, in ascertaining who, and who are not, ministers of the Gospel."[4] (emphasis added)

A re-concurrent theme during the debate over the ratification of the Constitution, is the impression of the Founders that Congress was powerless over the issue of religion in the absence of the First Amendment.[5] James Madison's fellow Virginian, Edmond Randolph, argued that "no power is expressly given to Congress over religion."[6]

Echoing these sentiments at the North Carolina convention, Richard Dobbs Spaight said: "As to the subject

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[3] James Madison speech in the Virginia Ratifying Convention, June 12, 1788 as quoted in David B. Mattern, "*James Madison's 'Advice To My Country'* ", p. 87 (1997).

[4] James Madison's speech in Congress, February 2, 1790, *Id.* at 87.

[5] Leonard W. Levy, *The Origins of the Bill of Rights*, p. 81 (1999).

[6] *Id.*

of religion . . . [n] o power is given to the general government to interfere with it at all. Any act of Congress on this subject would be a usurpation."[7] It follows that the exercise of subject matter jurisdiction over the Petitioners would be contrary to the original intent of the Constitution and First Amendment. The state cannot impose a "reasonable bishop standard" upon the church.[8]

PROPOSITION II

AN EXERCISE OF JURISDICTION WOULD LEAD TO AN UNAVOIDABLE CLASH WITH THE CANON LAW OF THE CATHOLIC CHURCH.

The following Code of Canon Laws of the Catholic Church are applicable to the facts as alleged in Plaintiffs' Petition because the bishop's exercise of discretion while under the inspiration of the Holy Spirit has clearly been put at issue by the Plaintiffs. Plaintiffs' lawsuit would require a jury to review the reasonableness of how the bishop exercised his discretion in carrying out his duties outlined under the canon law of the church.

"Canon 375:

> (1) Bishops, who by divine institution, succeed to the place of the apostles *through the Holy Spirit* who has been given to them, are constituted pastors in the church, so they are teachers of doc-

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[7] *Id.*

[8] See *Catholic High School Association of New York v. Culvert*, 753 F.2d 1161, 1166 (2nd Cir. 1985) ("If we allow the camel to stick its nose into the constitutionally protected tent of religion, what will follow may not always be controlled. Thus, we must now turn to the question of whether the camel can be kept firmly tethered outside.")

trine, priests of sacred worship, and ministers of governance.

(2) Through episcopal consecration itsslf, bishops receive, with the function of sanctifying also the functions of teaching and *governing*, by their nature, however, these can be exercised only in the hierarchical communion with the head and members of the college." (emphasis added) (Appendix, Exhibit E.)

Canon 524 discusses the bishop's authority to place priests he sees fit under the inspiration of the Holy Spirit as described in Canon 375:

"Canon 524:

After he [the bishop] has weigned all the circumstances, the diocesan bishop is to confer a vacant parash on the person whom he judges suited to fill its parochical care without any partiality; in order to make a judgment concerning a person's suitability, he is to listen to the vicar forane, conduct appropriate investigations and, if warranted, listen to certain presbyters and lay persons of the Christian faithful." (emphasis added) (Appendix, Exhibit E.)

Canon 524 makes it very plain that the bishop has the discretion, under the inspiration of the Holy Spirit, to make decisions as to the qualifications of placing a priest in a given parish.

Equally formal and binding is the *Catechism of the Catholic Church* which is a compilation of the theological teachings and beliefs of the Roman Catholic Church. This document was, in 1994, promulgated by His Holiness, Pope John Paul II. Paragraphs 894 and 895 of the *Catechism* further describe the power of the bishops to govern the affairs of the Catholic Church.

No. 894:

"The bishops, as vicars and legates of Christ, govern the particular Churches assigned to them by their counsels, exhortations, and example, but over and above that also by the authority and sacred power, which indeed they ought to exercise so as to edify, in the spirit of service, which is that of their Master." (Appendix, Exhibit F.)

No. 895:

"The power which they personally exercise in the name of Christ is proper, ordinary, and immediate, although it's exercise is ultimately controlled by the supreme quthority of the church. But the bishops should not be thought of as vicars of the Pope. His ordinary and immediate authority over the whole church does not annul, but on the contrary, confirms and defends that of the bishops. Their authority must be exercised in common with the whole Church under the guidance of the Pope." (Appendix, Exhibit F.)

To answer the question of whether Petitioners negligently hired and supervised the former priest in question would require the jury to apply the religious teaching of the Catholic Church found in the Canon law and Catechisms. The Oklahoma Supreme Court's holding in *Hadnot v. Shaw,* 826 p.2d 978, 988 (Okla. 1992), should be controlling in the instant case:

"When the target of civil litigation is the church's implementation of its valid ecclesiastical judicature, the Free Exercise Clause of the First Amendment will afford a shield from interference by secular inquest."

Indeed, the trend of the Oklahoma Supreme Court has been to insulate religious organizations from secular re-

view of administrative action. *Guinn v. Church of Christ of Collinsville,* 775 P.2d 766, 772, n. 18 (Okla. 1989) (". . . We are of the opinion that a church's disciplinary decisions are protected from judicial scrutiny. . ."). *Bladen v. Presbyterian Church of Sallisaw,* 857 P.2d 789 (Okla. 1993) (The Free Exercise Clause of the First Amendment must shield the church from tort liability on a parishioner's suit when the church's act occurs in the context of the church's ecclesiastical jurisdiction.)

"First Amendment values are plainly jeopardized when . . . litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice." *Presbyterian Church v. Hull Church,* 373 U.S. 440, 449, 89 S.Ct. 801, 21 L.Ed.2d 658 (1969). See also, *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971) (Religion clauses were intended to protect against state involvement or entanglement with religion.)

PROPOSITION IV

THE NEGLIGENT HIRING, RETENTION AND SUPERVISION CAUSE OF ACTION REQUIRES UNCONSTITUTIONAL ENTANGLEMENT WITH CHURCH DOCTRINE AND POLICIES.

The following is a collection of cases from various jurisdictions that have recognized the legal principle that the First Amendment bars the state in the context of civil litigation, from evaluating religious organization's personnel decisions. The issue was decided in cases that involved allegations that a clergyman engaged in child molestation.

Schmidt v. Bishop, 779 F.Supp. 321 (S.D.N.Y. 1991) (It would be "inappropriate and unconstitutional . . . to determine after the fact that the ecclesiastical auth-

orities negligently supervised or retained defendant bishop. Any award of damages would have a chilling affect leading indirectly to state control over the future conduct of affairs of religious denomination", and therefore violate the "text and history of the establishment clause."); *Ayon v. Gourley,* 47 F.Supp.2d 1246, 1250 (D. Colo. 1998). (For a secular court to review the hiring policies of clergymen require examination of church policy and doctrine. This would create excessive entantlement in church operations and constitute encroachment upon the church's religious functions.); *Swanson v. Roman Catholic Bishop,* 692 A.2d 441, 445 (Md. 1997) (Applying secular agency principles to church governance and to impose liability for any deviation from a secular standard would impair the free exercise of religion and cause the state to control denominational governance.); *Gibson v. Brewer,* 552 S.W.2d 237, 247 (Mo. 1997) ("Adjudicating reasonableness of a church's supervision of a cleric – what the church 'should know' – requires inquiry into religious doctrine."); *Doe v. Evans,* 718 So.2d 287, 191 (Fla. App. 4 Dist. 1998) ("[A] court's determination regarding whether the church defendant's conduct was "reasonable. would necessarily entangle the court in issues of the church's religious law, practices and policies. 'Hiring', in a traditional sense, does not occur in some religions, where a person is ordained into a particular position in the church, and is assigned to one parish or another.")

The Supreme Court of Wisconsin recognized the constitutional problems allowing a negligent hiring and retention lawsuit to proceed against a religious organization and its decision of *L.L.M. v. Clauder,* 563 N.W.2d 434 (Wis. 1987). It found that a negligent supervision

claim would "require a court to formulate a 'reasonable cleric' standard, which would vary depending on the cleric involved."[9]

To illustate, under Plaintiffs' cause of action, a "reasonable bishop standard" would have to be imposed, an analogy that can be taken from the professional liability instructions of OUJI 2d, Instruction No. 14.7, (Duty of an Architect); No. 14.8 (Duty of an Accountant); No. 14.9 (Duty of an Attorney). For instance, the instruction relating to the duty of care owed by an attorney reads as follows:

> "An attorney must possess that degree of knowledge and ability ordinarily possessed by other members of that profession, and, further, must exercise ordinary care, skill, diligence and knowledge in the performance of any service undertaken as an attorney."

Thus, in the above instruction, if the Plaintiffs had their way, we would merely replace the word "attorney" with the word "bishop". The effect of the instruction rather dramatically demonstrates the point, that should Plaintiffs' negligent supervision or retention lawsuit move forward, the judge and jury would have to apply "reasonable bishop standard" in relation to the application of canon law and spiritual concepts as mercy, repentance and admission.

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[9]The *Clauder* court cited with approval the following language from the Law Review article entitled *"Clergy Sexual Misconduct: Confronting the Difficult Constitutional & Institutional Liability Iasues"*, 7 St. Thomas L. Rev. 31 (1994): "Out pluralistic society dislikes having its neutral juris and place themselves in the role of a 'reasonable chief rabbi', 'reasonable bishop', etc., because of the degree of involvement that must accompany such decisional framework for a civil tort judge."

There may be issues in this litigation such as mercy and forgiveness and rehabilitation commonly called "grace". There is a dichotomy in perspectives between secular standards of employment and ecclesiastical standards with regard to supervision and retention of clergymen. The *Clauder* opinion discussed dichotomy, saying:

> "The reconciliation and counseling of the errant clergy person involves more than a civil employer's file of reprimand, or a three day suspension without pay for misconduct. Mercy and forgiveness of sin may be concepts familiar to bankers, but they have no place in the discipline of bank tellers. For clergy, they are interwoven in the institution's norms and practices. Therefore, due to the strong belief in redemption, a bishop may determine that a wayward priest can be sufficiently reprimanded through counseling and payer. If a court was asked to review such conduct to determine whether the bishop should have taken some other action, the court would directly engangle itself in the religious doctrines of faith, responsibility and obedience." *Clauder*, supra at ¶ 23.

Should the State of Oklahoma require a jury to establish a reasonable bishop standard, the effect would be to impose a model or a standard of ordinary care of how a religious organization should go about its business. This would create an officially state sanctioned establishment of religious practice. The establishment clause of the First Amendment expressly prohibits a state to impose an establishment of religion. Therefore, Plaintiffs' negligent hiring and retention cause of action must fail because of the First Amendment's bar on the state establishing a religion.

PROPOSITION V

FIRST AMENDMENT CREATES IMMUNITY FROM CHURCHES AND RELIGIOUS ORGANIZATIONS FROM CIVIL DISCOVERY WHEN THE DISCOVERY IS DIRECTED TO FINDING OUT HOW THE RELIGIOUS ORGANIZATION OPERATES.

The First Amendment's Establishment Clause and Free Exercise Clause grant churches an immunity from civil discovery and trial to avoid subjecting a religious institution to defending religious beliefs and practices in a court of law. See *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 503, 99 S.Ct. 1313, 1320, 59 L.Ed.-2d 533 (1979). If Defendants were exposed to discovery by means of deposition, requests for production of documents, etc., their constitutional right to operate free of judicial scrutiny regarding placement of clergy would be irreparably violated. *First United Church v. White*, 571 A.2d 790, 792 (D.C. App. 1990).

See also, *Rayburn v. General Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985) (Finding that discovery that would be conducted in a Title VII lawsuit would excessively entangle the state in the affairs of a church. The process of the very inquiry in leading to the findings and conclusions in the litigation may infringe on rights guaranteed by the religion clauses. "Church personnel and records would inevitably become subject to subpoena, discovery, cross-examine, the full panoply of legal process designed to probe the mind of the church and the selection of its ministers.")

The hallmark of a free exercise violation is the presence of coercion by the state. *School District of Abington v. Schempp*, 374 U.S. 203, 223, 83 S.Ct. 1560, 1572, 10 L.Ed.2d 844 (1963); *Engel v. Vitale*, 370 U.S. 421, 430, 82 S.Ct. 1261, 1266, 8 L.Ed.2d 601 1962.

Coercion of the state in this instance is, through the Oklahoma Discovery Code, requiring these Defendants to submit to the discovery process. Plaintiffs have requested, through discovery, have requested documents regarding church personnel policy. Plaintiffs have sought discovery by way of deposition of Archbishop Beltran and Salatka, to question them about their mental processes concerning any supervision regarding the priest in question.

The state does not have the constitutional authority to probe into the internal operations of a church without limitation or compelling purpose. *Word of Faith World Outreach Str. Ch. v. Morales*, 787 F. Supp. 689, 699 (W.D. Tex. 1992), rev'd on other grounds, 986 F.2d 962 (5th Cir. 1993). In *Morales*, the federal court refused to allow the state of Texas to coerce the production of documents of membership lists, financial records, meetings of the Board of Directors, policy and procedural manuals concerning the operation of the church. The court also found that: "Full and complete documentation of the church's internal affairs may further that purpose [investigation determined if the church was persuading people to contribute through misrepresentation or fraud], but such discretion is over broad and if not more narrowly drawn, could not survive constitutional attack." *Id.* at 700. If there is no constitutional end use of the information that is gathered, there is no reason for the court to wait until a constitutional violation has already occurred before prohibiting the production of documents from a religious organization. *Id.* at 702.

The above authority demonstrates the intrusiveness of discovery in the instant case would violate the Defendants' free exercise of religion rights. In order to avoid the

violation of the Defendants' rights, they respectfully request the court to stay all proceedings against them.

CONCLUSION

WHEREFORE, above premises considered, Petitioners, Archdiocese of Oklahoma City, Reverend Charles A. Salatka and Reverend Eusebius J. Beltran, pray this Court assume the original jurisdiction and issue a writ of prohibition directing the trial court not to assume subject matter jurisdiction over this case. Additionally, Petitioners pray this court issue a stay releasing the Petitioners from any obligations to respond to the Plaintiffs' Interrogatories. Requests for Production of Documents or present themselves for deposition, pending the Oklahoma Supreme Court's consideration of the Petitioners' Petition for Writ of Prohibition.

Respectfully submitted,

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APPENDIX L

[Filed May 22 2000]

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

#94730

JOHN DOE, individually;
OBLATES OF ST. FRANCIS de SALES;
THE ROMAN CATHOLIC CHURCH;
ARCHDIOCESE OF OKLAHOMA CITY;
REVERAND CHARLES A. SALATKA;
REVEREND EUSEBIUS J. BELTRAN; and
REVEREND ALFRED J. RUSSELL,

Petitioners,

vs.

HONORABLE NILES JACKSON,
JUDGE OF THE DISTRICT COURT OF OKLAHOMA
COUNTY, SEVENTH JUDICIAL DISTRICT,
OKLAHOMA,

Respondent.

PETITIONERS, ARCHDIOCESE OF OKLAHOMA CITY, REVEREND CHARLES S. SALATKA AND REVEREND EUSEBIUS J. BALTRAN'S, APPLICATION FOR THE OKLAHOMA SUPREME COURT TO ASSUME ORIGINAL JURISDICTION AND PETITION FOR WRIT OF PROHIBITION

COME NOW Petitioners, Archdiocese of Oklahoma City, Reverend Charles A. Salatka and Reverend Euse-

bius J. Beltran, pursuant to Oklahoma Supreme Court Rule 1.191, and pray that this court assume original jurisdiction and issue a writ of prohibition in the proceedings below. In support of their application, Petitioners would show the court the following, to-wit:

1. Petitioners are named Defendants in the cases of: (A) *Dennis W. Ballard and Ronald Ballard, individually; and Algerene Ballard, individually, Plaintiffs vs. John Doe, individually; Oblates Of St. Francis de Sales; Archdiocese Of Oklahoma City; Reverend Charles A. Salatka; Reverent Eusebius J. Beltran; and Reverend Alfred J. Russell, Defendants,* District Court of Oklahoma County, Case No. CJ-99-6364-65, and (B) *C.J., a minor, by and through his parents and next of friends, Jimmie Bartlett Johnson, Jr. and Pamela Gayle Johnson; and Jimmie Bartlett Johnson, Jr., individually; and Pamela Gayle Johnson, individually, Plaintiffs v. John Doe, individually; Oblates of St. Francis de Sales; Archdiocese Of Oklahoma City; Reverend Charles A. Salatka; Reverend Eusebius J. Beltran; and Reverend Alfred J. Russell, Defendants,* District Court of Oklahoma County, Case No. CJ-99-6829-65.

2. That Petitioners never answered the Plaintiffs' lawsuit, but, on February 18, 2000, specially appeared and filed a Motion to Dismiss on grounds of Lack of Subject Matter Jurisdiction and Plaintiffs' failure to state a claim upon which relief can be granted. The essence of the Petitioners' motion was that the First Amendment, by virtue of the incorporation doctrine of the Fourteenth Amendment to the United States Constitution, prohibited the District Court of Oklahoma County from exercising subject matter jurisdiction over Plaintiffs' negligent hiring and retention cause of action against Petitioners.

3. The Honorable Niles Jackson overruled the Petitioners' Motion to Dismiss on or about the 18th day of May, 2000. (Appendix Exhibit A)

The Exercise Of Subject Matter Jurisdiction Would Chill Religious Freedom

4. Petitioners have no other timely or effective means of relief available. To exercise subject matter jurisdiction would have a chilling affect on the fundamental First Amendment right to free exercise of religion. Indeed, should the lawsuit be allowed to proceed against the Petitioners, would have the affect of the State of Oklahoma exercise supervision of clergy members which would, by definition, constitute an excessive entanglement of the state in the church, contrary to the original intent of the First Amendment. For the Court to review the reasonableness of the supervision of a priest in the instant cases would result in the defacto establishment of religious practice by the state upon the church. To allow any award of damages predicated on a religious organization's alleged negligent placement and supervision of clergymen would create a chilling affect on the right of religious organizations to make religious based decisions in the placement of clergymen.

5. This application is not filed within ten days of any scheduled trial or hearing date.

The Nature Of Plaintiffs' Allegations

6. Plaintiffs, Ballard and C.J., have sued Petitioners alleging that they were sexually molested by a priest. Plaintiffs further allege that the Petitioners were negligent in the hiring, retention and supervision of the priest. (Plaintiffs' Fourth Amended Petition, and Third Amend-

ed Petition, Appendix as Exhibit B and C, respectively.) Plaintiffs further allege that these Petitioners were callous and reckless in allowing the priest to continue in his position of a priest once they received notification of the alleged molestation of Plaintiff. (Plaintiffs' Fourth Amended Petition, and Third Amended Petition, Appendix, Exhibits B and C.) The Petitioners deny these allegations. When Petitioners found out about the alleged activity involving the priest and the Plaintiffs, it was reported to law enforcement officials.

7. A careful examination of the Plaintiffs' Amended Petitions (included in the Appendix as Exhibits B and C.) reveals that the crux of the Plaintiffs' case against the Petitioners has put at issue: The Petitioners' evaluation of the priest's ecclesiastical qualifications; how a religious organization evaluates the ecclesiastical performance of a priest; and in what manner priests are to be supervised; how priests go about their duties.

8. The Plaintiffs have demanded judgment against the Petitioners for injuries, pain and suffering, medical expenses, mental and emotional distress, and exemplary damages in excess of $10,000.00. (Plaintiffs' Amended Petitions, Appendix Exhibits B and C.)

9. Plaintiff Johnson has also issued Requests for Production of Documents to the Petitioners. (Appendix, Exhibit D.)

10 Plaintiffs have demanded Petitioners, Archbishops Salatka and Beltran, be produced for depositions. Their depositions are presently scheduled for June 1, 2000.

11. On May 22, 2000, Petitioners filed with the trial court a Motion to Stay Discovery and All Proceedings pending the Oklahoma Supreme Court's disposition of

this Application for a Writ of Prohibition. As of this time, the trial court has not ruled on the Motion to Stay.

12. Filed contemporaneously with this application is Petitioners' Brief containing legal arguments and authorities in support of their position that the First Amendment bars the assertion of subject matter jurisdiction in this case.

CONCLUSION

WHEREFORE, above premises considered, Petitioners pray this Court assume original jurisdiction and issue an order to the lower court ordering that the cause of action against Petitioners be stayed pending the disposition of these proceedings; and issue a writ of prohibition to the lower court dismissing Plaintiffs' cause of action on grounds the First Amendment bars the assertion of subject matter jurisdiction in this case.

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APPENDIX M

[Filed MAY 23 2000]

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

No. 94743

OBLATES OF ST. FRANCIS de SALES,
an Ohio corporation,

Petitioner,

vs.

THE HONORABLE NILES JACKSON,
JUDGE OF THE DISTRICT COURT OF OKLAHOMA
COUNTY, SEVENTH JUDICIAL DISTRICT,

Respondent,

and

DENNIS BALLARD, individually,
RONALD BALLARD, individually, and
ALGERENE BALLARD, individually,

Real Parties in Interest.

APPLICATION TO ASSUME ORIGINAL
JURISDICTION AND
PETITION FOR WRIT OF PROHIBITION

Oblates of St. Francis de Sales, an Ohio Corporation ("Oblates"), pursuant to Article VII, Section 4 of the Oklahoma Constitution and Oklahoma Supreme

Court Rules, Rule 1.191 et seq., hereby requests that this Court assume original jurisdiction to issue a Writ of Prohibition against The Honorable Niles Jackson, Judge of the District Court of Oklahoma County, State of Oklahome, Seventh Judicial District and to correct the lower court's erroneous denial of the Petitioner's motions to dismiss.

1. The Supreme Court of the State of Oklahoma is granted power to assume original jurisdiction pursuant to Article VII, Section 4 of the Constitution of the State of Oklahoma in furtherance of its superintending control over all inferior courts and to prevent an inferior court from acting in excess of its judicial authority.

2. The Oblates is one of several defendants in two (2) civil actions currently pending before Respondent, The Honorable Niles Jackson, ("the Respondent Judge") in the District Court of Oklahoma County. The two cases have not been consolidated in the lower court, but because of the identity of issues and parties, have been treated as companion cases. This Petitioner has filed identical Applications seeking prohibition relief in both of the lower court cases. This Application seeks original jurisdiction in the case styled:

> ***Dennis W. Ballard and Ronald Ballard, individually; and Algerene Ballard, individually, Plaintiffs vs. John Doe, individually; Oblates of St. Francis de Sales; Archdiocese of Oklahoma City; Reverend Charles A. Salatka; Reverend Eusebius J. Beltran; and Reverend Alfred J. Russell, Defendants,*** District Court of Oklahoma County, Case No. CJ-99-6364-65.

3. On January 25, 2000, the Real Parties in Interest filed their Fourth-Amended, and Third-Amended Petitions, respectively, against Petitioners alleging that Dennis Ballard, while still a minor child, and C.J., a minor, were sexually molested by a priest ordained in the Catholic Church and a member of Oblates of St. Francis de Sales. The Real Parties in Interest's claims against the Oblates fall into two categories: (1) a claim for vicarious liability based solely on their allegation that the Oblates employed the priest; and (2) claims for direct liability based on theories of negligent hiring, retention and supervision.

4. On March 23, 2000, the Petitioner moved to dismiss the actions on the ground that the trial court lacked subject matter jurisdiction by virtue of the provisions of the First Amendment of the United States Constitution, and Article I, Section Two of the Oklahoma Constitution. Similar motions to dismiss was filed by Co-Defendents, Archdiocese of Oklahome City, Reverend Charles A. Salatka, Reverend Eusebius J. Beltran, and Reverend Eusebius J. Beltran.[1]

5. On May 15, 2000, without hearing oral argument, the Respondent Judge issued a memorandum order overruling all motions to dismiss. (Appendix No. 1)

6. The Respondent Judge wrongfully overruled the motions to dismiss. Unless this Court assumes original jurisdiction and issues a Writ of Prohibition to the lower court, the Respondent Judge will continue to exercise jurisdiction in excess of lawful judicial authority.

7. The Oblates demonstrate in their Brief, submitted contemporaneously with this Application, that

original jurisdiction and prohibition is proper for the following reasons:

i. The Supreme Court should exercise original jurisdiction when constitutional rights require immediate protection;

ii. Prohibition is proper when matters of public concern are impacted by litigation in the lower court;

iii. Judicial interference into the Oblates' ecclesiastical relationship with its clergy is barred by constitutional protections;

iv. The United States Supreme Court has consisttently held that governmental entanglement into protected religious activity is barred by the First Amendment;

v. Traditional tort pcincipals cannot be applied in the case at bar without requiring judicial interpretation of church doctrine and policy;

vi. Allegations of notice or knowledge do not correct the constitutional infirmities of Plaintiffs' claims; and,

vii. Because the priest's misconduct was outside the scope of his employment, the Oblates cannot be held vicariously liable under the doctrine of *respondeat superior.*

8. Pursuant to the due-process guarantees of the Fourteenth Amendment to the Constitution of the United States and Article II of the Oklahoma Constitution, the Petitioner has the right not to be forced to defend an action in a court that lacks lawful jurisdiction over it.

9. Petitioner has no other timely and effective means of relief available to it. Without the relief requested herein, Petitioner's substantial rights will be impaired, as it will be forced to spend unnecessary resources defending this case through discovery and trial before being permitted to seek relief on the issue of subject matter jurisdiction.

10. Further, allowing this case to proceed to trial could produce the very consequences prohibited by the First Amendment – excessive government entanglement into protected religious activities as well as a chilling effect on the ability of ecclesiastical organizations to govern themselves free from such entanglement.

11. This Application and Petition for Writ of Prohibition is filed more than ten (10) days before any dispositive hearing or trial in the lower court cases. Because the Real Parties in Interest now seek discovery of the Defendants, the Oblates' have filed in the lower court cases a motion to stay those proceedings pending this Court's resolution of the present matter. The hearing on the motion to stay is scheduled for June 1, 2000, at 1:30 p.m.

WHEREFORE, Petitioner, Oblates of St. Francis de Sales, respectfully requests this Court to assume original jurisdiction and issue a Writ of Prohibition directing the Respondent Judge to refrain from further proceedings in Case No. CJ-99-6364-65 and Case No. CJ-99-6829-65, pending in the District Court of Oklahoma County, and to dismiss the actions on the ground that subject matter jurisdiction is barred by the United States and Oklahoma Constitutions.

Petitioner further requests, in the event that the Respondent Judge overrules the pending motion to stay pro-

ceedings, that this Court issue an order staying further proceedings in the lower court until the present original jurisdiction issues are resolved.

Respectfully submitted,

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APPENDIX N

[Filed MAY 23 2000]

NO. 94743

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

OBLATES OF ST. FRANCIS de SALES,
an Ohio corporation,

Petitioner,

vs.

THE HONORABLE NILES JACKSON,
JUDGE OF THE DISTRICT COURT OF OKLAHOMA
COUNTY, SEVENTH JUDICIAL DISTRICT,

Respondent,

and

DENNIS BALLARD, individually,
RONALD BALLARD, individually, and
ALGERENE BALLARD, individually,

Real Parties in Interest.

BRIEF IN SUPPORT OF APPLICATION TO
ASSUME ORIGINAL JURISDITION AND
PETITION FOR WRIT OF PROHIBITION

Original Jurisdiction Proceeding Seeking Prohibition -
Oklahoma County District Court, State of Oklahoma,
Case No. CJ-99-6364-65,
The Honorable Niles Jackson Presiding

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May 23, 2000

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BRIEF IN SUPPORT OF APPLICATION TO ASSUME ORIGINAL JURISDICTION AND PETITION FOR WRIT OF PROHIBITION

Petitioner, Oblates of St. Francis de Sales ("Oblates") respectfully requests this Court to assume original jurisdiction and issue a Writ of Prohibition halting further exercise of jurisdiction by the Respondent Judge and the District Court of Oklahoma County ("District Court") and correcting the Respondent Judge's erroneous denial of Petitioner's motions to dismiss.

SUMMARY OF THE RECORD

The Real Parties in Interest, (hereinafter referred to as "Plaintiffs")[1] respectively, filed a Fourth-Amended Petition (App. No. 2) and Third-Amended Petition (App. No. 3) against Petitioner and other co-defendants alleging that Dennis Ballard, while still a minor child, and C.J., a minor, were sexually molested by a priest ordained in the Catholic Church and a member of the religious order, the Oblates of St. Francis de Sales. The Plaintiffs' claims against the Oblates fall into two basic categories: (1) a claim for vicarious liability based solely on Plaintiffs' allegation that the Oblates employed the priest; and (2) claims for direct liability based on theories of negligent hiring, retention and supervision.

Without answering the Plaintiffs' petitions, the Oblates filed motions to dismiss the claims on the grounds that the petitions failed to state a claim upon which relief could be granted and that the District Court lacked subject matter jurisdiction. The Oblates argued that Plain-

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[1] "Plaintiffs," as used herein, refers to the claimants in both cases, CJ-99-6364-65 and CJ-99-6829-65.

tiffs' claims are barred by the First Amendment to the United States Constitution and Article I, Section Two of the Oklahoma Constitution, and are not cognizable under the applicable Oklahoma case law. Without hearing oral argument, the Respondent Judge overruled the motions to dismiss by letter memorandum dated May 15, 2000. (App. No. 1).[2] The Petitioner seeks relief from this ruling, which enables the District Court to exercise unlawful jurisdiction in the matters below, and asks this Court to issue a Writ prohibiting further proceedings in the lower court and dismissing the actions filed by the Plaintiffs.

The Plaintiffs continue to seek discovery from the Oblates and the other defendants in the form of both written discovery requests, motions to compel, and demands for depositions. The Petitioner has filed in the lower court a motion to stay further proceedings pending this Court's disposition of the present matter. That motion has been scheduled for hearing before the Respondent Judge on June 1, 2000. Should the Respondent Judge overrule the motion to stay, Petitioner's Application for Original Jurisdiction filed contemporaneously with this Brief contains a request for relief from this Court to stay the proceedings below pending determination of the present matter. Such relief will be sought by emergency application pursuant to Supreme Court Rule 1.15(c)(1).

---

[2]Paragraph 1 of the Respondent Judge's letter memorandum sustains the Defendants' Motions to Strike, which were filed as a result of extraneous evidence attached to the Plaintiffs' response to the motions to dismiss. The Defendants objected to tendered materials on the grounds that the issues before the lower court involved matters of law, and matters outside the pleadings were improper for consideration on the motions to dismiss.

ARGUMENT AND AUTHORITIES

I.
THE SUPREME COURT SHOULD EXERCISE ORIGINAL JURISDICTION WHEN CONSTITUTIONAL RIGHTS REQUIRE IMMEDIATE PROTECTION

This Court is expressly granted supervisory power over the lower courts by Article VII, Section 4 of the Oklahoma Constitution in furtherance of its superintending control over all inferior courts and to prevent an inferior court from acting in excess of its judicial authority. Such relief is available during the early stages of litigation when pending proceedings will impact fundamental freedoms or involve matters of broad public concern.

After a District Court's denial of a preliminary dispositive motion, this Court has exercised original cognizance to protect against intrusion into fundamental constitutional rights at stake in the trial-court process. *See Gaylord Entertainment v. Thompson, et al.*, 1998 OK 30, 958 P.2d 128, and *Brock v. Thompson*, 1997 OK 127, 948 P.2d 279. In such cases, the Supreme Court assumes original jurisdiction to prohibit the use of "unauthorized or excessive judicial force in nonactionable claims" and issues a writ of prohibition when First Amendments rights require immediate protection from encroachment by the lower court. *Gaylord Entertainment* at 136. *See also Sabouri v. Hunter*, 1979 OK 95, 596, P.2d 891, and *Powell v. Seay*, 553 P.2d 161 (Okla. 1976).

The District Court in the present case is requiring ecclesiastical organizations to defend themselves in court for the manner in which they govern their clergy. Such secular intrusion into protected religious activity encroaches upon protected fundamental rights and breaches

the separation of church and state. Should the case continue, the threat of burdensome discovery and harassing lawsuits will cause a chilling effect on freedom of religious governance.

An employer's conduct can be scrutinized to determine if the employer has deviated from an accepted standard of care and thereby negligently hired, supervised, or retained an employee. However, the District Court seeks to evaluate the relationship between the priest and the Oblates just as it would any other employer/employee relationship. To evaluate such claims, the District Court would need to fabricate an acceptable standard of care for a religious order and would need to answer many questions of significant religious concern, such as: When are a person's transgressions so unacceptable that a religious order, no matter its belief in the power of God to forgive and mend, must find he cannot be accepted or retained? Does a religious order have the right or authority to "dismiss" a cleric who has validly received sacred ordination? When should the traditional concept of confession and absolution be doubted or denied? The District Court lacks jurisdiction to decide such issues.

Under the clear mandate of the Free Exercise Clause of the First Amendment to the United States Constitution, civil courts cannot determine who can be ordained a priest or who can be an Oblate. Further, the civil courts cannot determine how or who within the hierarchy of a church or religious order must discipline a wayward cleric, or when the church must set aside its traditions of penitence and forgiveness. To preserve the separation between church and state, the civil courts are constitutionally precluded from analyzing the inner workings of religious institutions.

Moreover, the Fourteenth Amendment to the Constitution of the United States and Article II, Section 7 of the Oklahoma Constitution provide the due-process guarantees that the Petitioner has the right not to be forced to defend an action in a court that lacks lawful jurisdiction over it.

II.

PROHIBITION IS PROPER WHEN MATTERS OF PUBLIC CONCERN ARE IMPACTED BY LITIGATION IN THE LOWER COURT

This Court has held that prohibition is also a proper remedy where the lower court is exercising unauthorized judicial power in matters involving public policy and broad public concern. *Davis v. Thompson*, 1986 OK 38, 721 P.2d 789, and *Cannon v. Lane*, 1993 OK 40, 867 P.2d 1235. Plaintiffs' claims necessarily involve a matter of broad public concern – a large number of citizens will be impacted by allowing secular prosection of religious organizations under traditional theories of employment-related tort law.

A case of more broad public concern is difficult to imagine – random triers of fact would be asked to evaluate Catholic traditions of confession, forgiveness, and redemption. Allowing employment-related negligence claims against ecclesiastical organizations is the first step down a slippery slope which could lead to burdensome litigation and inconsistent jury verdicts. Excessive government entanglement and a chilling of fundamental religious practices would result, as unpopular or misunderstood religions could be litigated out of existence in one region, while being subjectively protected in another.

III.

JUDICIAL INTERFERENCE INTO THE OBLATES' ECCLESIASTICAL RELATIONSHIP WITH ITS CLERGY IS BARRED BY CONSTITUTIONAL PROTECTIONS

The Free Exercise Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." This protection preserves religious independence from both judicial and legislative state interference. *Kreshik v. Saint Nicholas Cathedral,* 363 U.S. 190, 191, 80 S.Ct. 1037, 1038 (1960). (Emphasis Added).

Section Two of the First Article of the Oklahoma Constitution states, "Perfect toleration of religious sentiment shall be secured, and no inhabitant of the State shall ever be molested in person or property on account of his or her mode of religious worship, and no religious test shall be required for the exercise of civil or political rights. Polygamous or plural marriages are forever prohibited."

A. The United States Supreme Court Has Consistently Held That Governmental Entanglement Into Protected Religious Activity Is Barred By The First Amendment.

Since its ratification in 1791, the First Amendment has been invoked by the United States Supreme Court to shield and protect religious freedom. Under the Fourteenth Amendment, the protections guaranteed by the First Amendment apply to state, as well as federal, governmental intrusion into protected rights. *Cantwell v. State of Connecticut,* 310 U.S. 296, 60 S.Ct. 900 (1940). "The essential characteristic of these [religious] liberties is, that under their shield many type of life, character, opinion and belief can develop unmolested and unob-

structed." *Id.*, 60 S.Ct. at 906. Government must be neutral in "its relations with groups of believers and non-believers", *Everson v. Board of Education of Ewing TP*, 330 U.S. 1, 18 (1947), and cannot force a person to "profess a belief or disbelief in any religion." *Id.* at 15. Matters of religious controversy and whether church organizations have or have not departed from religious doctrine are purely ecclesiastical matters. *Watson v. Jones*, 80 U.S. [13 Wall.] 679, 20 L.Ed. 666 (1872).

B. Traditional Tort Principals Cannot Be Applied In The Case At Bar Without Requiring Judicial Interpretation Of Church Doctrine And Policy.

The constitutional right of religious organizations to be free from governmental interference as applied to priest-misconduct cases was well-articulated by the Supreme Court of Wisconsin in *Pritzlaff v. Archdiocese of Milwaukee*, 194 N.E.2d 780 (Wis. 1995). There, the alleged sexual misconduct of a priest formed the basis for a parishioner's claim against the church for negligent hiring, retention, training and supervision of its clergy. The court found that the First Amendment prohibited judicial inquiry into the practices of the Archdiocese and held that the plaintiff had filed to state a claim upon which relief could be granted. *Id.* at 789-90.

First, in considering whether a claim for negligent hiring or retention could be pressed, the court stated:

> ". . . But, we conclude that the First Amendment to the United States Constitution prevents the courts of this state from determining what makes one competent to serve as a Catholic priest since such a determination would require interpretation of church canons and internal church policies and practices. Therefore, [plaintiff's] claim is not cap-

able of enforcement by the courts." (Emphasis Added).

The rationale for this rule was recently aptly summarized by a pair of commentators as follows:

> Examining the ministerial selection policy, which is 'infused with the religious tenets of the particular sect,' entangles the court in qualitative evaluation of religious norms. Negligence requires the court to create a 'reasonable bishop' norm. Beliefs in penance, admonition and reconciliation as a sacramental response to sin may be the point of attack by a challenger who wants a court to probe the tort-law reasonableness of the church's mercy toward the offender . . . . The tort of negligent selection of unsuitable teachers has been recognized in civil courts. If negligent selection of a potential pedophile for the religious office of a priest, minister or rabbi is a tort as to future child victims, will civil courts also hear Title VII challenges by the non-selected seminarian against the theological seminary that declines to ordain a plaintiff into ministry because of his psychological profile? How far shall the courts' qualitative entanglement with religious selectivity extend? (Emphasis Added).

Id. at 790 (quoting James T. O'Reilly & Joann M. Strasser, *Clergy Sexual Misconduct: Confronting the Difficult Constitutional and Institutional Liability Issues*, 7 St. Thomas L. Rev. 31 (1994)) (App. No. 4).

Next, the *Pritzlaff* court discussed whether a claim could be pressed for the supervision and training of clergy:

> [S]tate inquiry into the training and supervision of clergy . . . is nonetheless prohibited by the

First Amendment under most if not all circumstances. As one court stated in refusing to allow a claim for negligent supervision:

> [A]ny inquiry into the policies and practices of the church defendants in hiring or supervising their clergy raises the same kinds of First Amendment problems of entanglement discussed above, which might involve the court in making sensitive judgments about the propriety of the church Defendants' supervision in light of their religious beliefs . . . The traditional denominations each have their own intricate principles of governance, as to which the state has no right of visitation. Church governance is founded in scripture, modified by reformers over almost two millenia. (Emphasis Added).

Id. at 791 (quoting *Schmidt v. Bishop*, 779 F.Supp. 321, 332 (S.D.N.Y. 1991)).[3]

The Wisconsin court reaffirmed its holding in *Pritzlaff* and described the constitutional barriers which prevent state judicial review of ecclesiastical relationships in the Roman Catholic church in *L.L.N. v. Clauder*, 209 Wis.2d 674, 563 N.W.2d 434, (Wis. 1997). The court stated:

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[3]The *Schmidt* court concludes its opinion with an important statement:

> "It would therefore also be inappropriate and unconstitutional for this Court to determine after the fact that the ecclesiastical authorities negligently supervised or retained the defendant Bishop. Any aware of damages would have a chilling effect leading indirectly to state control over the future conduct of affairs of a religious denomination, a result violative of the text and history of the establishment clause." (Emphasis Added) 779 F.Supp. at 331.

[O'Reilly and Strasser] further elaborate on the reasons why "the measurement of duty and reasonableness needed to find negligence will inevitably entangle the civil court in the nuances of religious discipline practices." (Emphasis Added). For example, O'Reilly and Strasser state that the Roman Catholic Church has internal disciplinary procedures that are influenced by a religious belief in reconciliation and mercy. They explain:

> The reconciliation and counseling of the errant clergy person involves more than a civil employer's file reprimand or three day suspension without pay for misconduct. Mercy and forgiveness of sin may be concepts familiar to bankers but they have no place in the discipline of bank tellers. For clergy, they are interwoven in the institution's norms and practices. (Emphasis Added).

Therefore, due to this strong belief in the redemption, a bishop may determine that a wayward priest can be sufficiently reprimanded through counseling and prayer. If a court was asked to review such conduct to determine whether the bishop should have taken some other action, the court would directly entangle itself in the religious doctrines of faith, responsibility, and obedience. (Emphasis Added).

Likewise, O'Reilly and Strasser explain that negligent supervision claims would require a court to formulate a "reasonable cleric" standard, which would vary depending on the cleric involved, i.e., reasonable Presbyterian pastor standard, reasonable Catholic archbishop standard, and so on. Such individualized standards would be required because, as previously mentioned, church doctrines and practices are intertwined with the supervision and discipline of clergy. However, as O'Reilly and

> Strasser state: "Our pluralistic society dislikes having its neutral jurists place themselves in the role of a 'reasonable chief rabbi,' 'reasonable bishop,' etc., because of the degree of involvement that must accompany such decisional framework for the civil tort judge." This further explains why this court held that negligent supervision claims are "prohibited by the First Amendment under most if not all circumstances." (Emphasis Added).

L.L.N. v. Clauder, 209 Wis.2d at 689-91 (quoting O'Reilly v. Strasser, *supra*)

In *Swanson v. Roman Catholic Bishop of Portland,* 692 A.2d 441 (Me. 1997), the court considered the issue of whether tort liability could be imposed against the church for negligent supervision of a priest. The court held that the plaintiffs' claim was barred by constitutional principles. *Id.* at 444. The *Swanson* court stated:

> When a civil court undertakes to compare the relationship between a religious institution and its clergy with the agency relationship of the business world, **secular duties are necessarily introduced into the ecclesiastical relationship and the risk of constitutional violation is evident.** (Emphasis Added).

Id. The court reasoned that the principles involved in the plaintiffs' claim required an examination of religious law and usage regarding the church's authority over the priest. The court noted the important point that canon law severely restricted the ability of the church to remove, transfer and supervise the priest, and found that the First Amendment precluded an inquiry into the allocation of power within a heirarchical church. *Id.*

Moreover, while acknowledging that some other courts had allowed negligent supervision claims against churches if the facts required no interpretation of church doctrine,

the *Swanson* court found that an inquiry into the ecclesiastical relationship between the priest and the Catholic Church was unconstitutional:

> The imposition of secular duties and liability on the church as a "principal" will infringe upon its right to determine the standards governing the the relationship between the church, its bishop, and the parish priest. (Emphasis Added).

Id. at 444-45.

The court also rejected those cases where the claim was allowed to proceed if the defendant had allegedly received notice that an individual clergyman was potentially dangerous. The court concluded that imposing a secular duty of supervision on the church would restrict the church's freedom to adhere to its ecclesiastical procedures. *Id.* at 445.

The Oklahoma Supreme Court has not ruled on the issue of whether the First Amendment precludes claims for employment-related liability against an ecclesiastical religious institution. *N.H. v. Presbyterian Church (U.S.A.)*, 1999 OK 88, ¶26 (First Amendment analysis unnecessary in case involving pastoral sexual misconduct because underlying facts supported no employment-related liability against church); *Bladen v. First Presbyterian Church*, 857 P.2d 789, 797 (Okla. 1993) (Because plaintiffs' claims against minister were not cognizable, employment-related claims against church were not viable and First Amendment analysis was not reached).[4]

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[4]However, in *N.H v. Presbyterian Church, supra*, the Honorable Nancy Coats of the Seventh Judicial District of the State of Oklahoma granted summary judgment on the grounds that the plaintiff's claims against the church were barred by the First Amendment. On appeal, the Supreme Court affirmed the trial

[footnote continued]

However, the Oklahoma Supreme Court has held that the First Amendment prohibits the government from imposing its own ideas on the religious organization. *Guinn v. Church of Christ of Collinsville, supra,* 775 P.2d 766, 772 (Okla. 1989) (under the First Amendment people may freely consent to being spiritually governed by an established set of ecclesiastical tenets defined and carried out by those chosen to interpret and impose them.)

In order to exercise jurisdiction in the present matter, the District Court must pass judgment upon the policies and practices of the Oblates and its internal organization. However, the cases discussed herein repeatedly acknowledged the central fact that the ***governance of clergy within the Catholic religion is controlled by fundamental religious beliefs and church doctrine.*** Application of traditional tort principles of agency and employment-related liability in the present case would result in excessive entanglement between church and state. Such judicial scrutiny would inhibit religious freedom, and would ultimately result in state endorsement of one approved method of religious organization over another. The Free Exercise Clause of the First Amendment prohibits a state civil court from adjudicating the matters set forth in the present case.

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court's dismissal of the plaintiff's case on other grounds. (*See* discussion of *respondeat superior, infra.*) Nonetheless, Judge Coats was obviously persuaded by the constitutional argument, and granted summary judgment in favor of the defendant on all claims and causes of action.

IV. ALLEGATIONS OF NOTICE OR KNOWLEDGE DO NOT CORRECT THE CONSTITUTIONAL INFIRMITIES OF PLAINTIFFS' CLAIM

In paragraph 2 of the lower court's letter order (App. No. 1), the Respondent Judge denied Petitioner's motions to dismiss by stating, "*N.H. v. Presbyterian Church*, 1999 OK 88, at section B of the opinion, clearly allows an employer to be sued if proper knowledge is alleged, as it is alleged in this case." However, this general statement of employment law fails to address the very issues which were before the lower court in the motions to dismiss in this case. The fundamental question is not whether an the Plaintiffs have pled a prima facie employment-law claim, but whether such general standards can constitutionally be applied to the inner workings of religious institutions.

Considerations of knowledge and notice were not mentioned in the portion of the *N.H. v. Presbyterian Church* opinion analyzing *respondeat superior* – those factors were discussed only in the sections of the opinion dealing with negligent hiring, retention and supervision. The *N.H. v. Presbyterian Church* opinion simply holds that, as a matter of general employment law, a claim against an ecclesiastical organization for negligent hiring, supervision, and retention will not lie if the organization had no knowledge of its employee's propensity to commit the harm. *Id.* at ¶19-20. A constitutional analysis was therefore unnecessary, and this Court expressly declined to address the First Amendment issue of allowing such claims to be asserted against an ecclesiastical organization. *Id.* at ¶26.

The Plaintiffs' allegations of knowledge and notice make no impact upon the constitutional barrier which removes this case from the subject matter jurisdiction

of the District Court. This principle is established in *Ayon v. Gourley*, 47 F.Supp.2d 1246 (Colo. Dist. Ct. 1998). There, the Archdiocese was sued for damages arising from sexual abuse by a priest. The plaintiff alleged that the Archdiocese had prior notice of the priest's propensities, and therefore asserted a claim for negligent hiring and supervision, as well as a claim for outrageous conduct. The court found that dismissal of the petition would be proper because a consideration of *any of the claims* against the Archdiocese would be unconstitutional. *Id.* at 1251. The court specifically stated that the outrageous conduct claim, where the plaintiff claimed that church defendants acted with knowledge, could not open the door for judicial scrutiny of church procedures:

> [T]he analysis of this claim for First Amendment purposes would appear to be very similar to that for the negligent supervision claim. The difference, of course, is the intentional nature of the act. **This difference does not change the fact that it is the Archdiocese Defendants' oversight riles with regard to [the priest] that would have to be considered to determine if their conduct was appropriate. Whether examined for negligence or intent, it is the Archdiocese Defendants' actions in supervising [the priest] which would be at issue for both claims.**
>
> * * *
>
> The court finds that the result is the same for the negligent supervision and outrageous conduct claims. . . . [T]he procedures that the Archdiocese Defendants have in place regarding supervision would have to be examined to determine whether they were reasonable and adequate. **This would clearly be inappropriate governmental involvement**

> and a burden on these Defendants' exercise of religion. Consequently, Plaintiff's claims against the Archdiocese Defendants must be dismissed as violative of the First Amendment. (Emphasis Added)

Similarly, in *Swanson v. Roman Catholic Bishop of Portland, supra,* 692 A.2d 441, the court rejected the position that a claim could proceed if the defending church had knowledge that an individual clergyman was potentially dangerous:

> We conclude, however, that these few courts have failed to maintain the appropriate degree of neutrality required by the United States and Maine Constitutions. Although "[t]he Supreme Court has consistently recognized that the religion clauses are subject to a balancing of interests test," the Court "has also concluded that certain civil rights protected in secular settings are not sufficiently compelling to overcome certain religious interests." We conclude that, on the facts of this case, imposing a secular duty of supervision on the church and enforcing that duty through civil liability would restrict its freedom to interact with its clergy in the manner deemed proper by ecclesiastical authorities and would not serve a societal interest sufficient to overcome the religious freedoms inhibited. (Emphasis Added).

Id. at 445 (citing *Minker v. Baltimore Annual Conference of United Methodist Church,* 894 F.2d 1354 (D.C. Cir. 1990)).

The District Court seeks to evaluate the knowledge and conduct of the Oblates and determine whether the church should, in some situations, abandon its traditional norms regarding the selection of clergy. However, a civil court or jury is not permitted to discard an estab-

lished ecclesiastical policy and impose its own judgment about what is appropriate. Even when faced with emotional issues such as sexual misconduct, the District Court is constitutionally prohibited from reviewing and ruling upon clerical governance. Whether or not the Plaintiffs allege prior knowledge in their petition, the basic fact remains that religious belief and doctrinal policy control the manner in which a priest is called and allowed to serve.

Even the mere argument that the church defendants' knowledge and subsequent actions somehow qualify the case for judicial scrutiny requires an unconstitutional interpretation of religious ideology.[5] The state will be dictating the point at which the church should set aside its doctrine and mold its behavior to comply with common-law tort principles. Every judge and juror in the land will have a different opinion about this issue.

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[5]Even at seemingly surface-level analysis, governmental interpretation of religious policy has been avoided by the courts as excessive entanglements. In *Lemon v. Kurtzman*, 403 U.S. 602, 619-620, 91 S.Ct. 2105, 2114-15 (1971), the Court reviewed the system used to determine whether a religious school could receive state financial aid where the state was required to determine the amount per-pupil sent by the school on secular education versus religious activity:

> "This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches. The Court noted 'the hazards of government supporting churches' in *Walz v. Tax Commission*, 397 U.S., at 675, 90 S.Ct., at 1414, and we cannot ignore here the danger that pervasive modern governmental power will ultimately intrude on religion and thus conflict with the Religion Clauses." *Lemon v. Kurtzman*, 403 U.S. 602, 619-620, 91 S.Ct. 2105 (1971) (Emphasis Added).

Every jurisdiction will apply a different standard of conduct. Some religious systems will "pass the test" and some will not – most likely to the great detriment of unpopular or alternative religions.

In order for employment-related tort law to be equitably applied in our judicial system, rational and consistent rules must be promulgated. Jury instructions regarding reasonableness, duty, causation, and forseeability must be arcitulated so that they can be understood and applied. It would be impossible for our civil courts to create useable guidelines regarding the multi tude of religious beliefs in our society without breaching the separation of church and state. This Court is faced with the emotional issue of sexual misconduct by a priest. Nonetheless, imposing employment-related tort liability against the church defendants for the priest's conduct is barred by the Constitution.

V. BECAUSE THE PRIEST'S MISCONDUCT WAS OUTSIDE THE SCOPE OF HIS EMPLOYMENT, THE OBLATES CANNOT BE HELD VICARIOUSLY LIABLE UNDER THE DOCTRINE OF *RESPONDEAT SUPERIOR.*

The District Court should be prohibited from allowing any claim against the Petitioner to proceed under the doctrine of *respondeat superior.* As a matter of law, a church or religious order is not vicariously liable for a cleric's molestation of a minor – such conduct falls outside the scope of anyone's employment. The Oklahoma Supreme Court has addressed this very issue and has ruled as a matter of law that a church is not vicariously liable for the sexual conduct of a priest or minister. This rule is clearly set forth in *N.H. v. Presbyterian Church (U.S.A.)*, 1999 OK 88.

In *N.H. v. Presbyterian Church,* minor plaintiffs who had been molested by a minister sought to impose liability upon the Presbyterian Church under the doctrine of *respondeat superior.* Ths Oklahoma Supreme Court unequivocally held that vicariously liability under that doctrine could not be imposed upon a church for its minister's sexual misconduct. *Id.* at ¶ 14-18. The court also rejected the argument that ratification allowed vicarious liability, reasoning that no benefits were derived or accepted by the church as a result of the minister's tortious conduct. *Id.* at note 32.

Oklahoma's rule of law is consistent with the holdings of courts across the country that have faced this very issue. See, e.g., *Tichenor v. Roman Catholic Church of Archdiocese of New Orleans,* 32 F.3d 953, 960 (5th Cir. La. 1994); *Rita M. v. Roman Catholic Archbishop of Los Angeles,* 187 Cal.App.3d 1453, 1461 (1986); *Byrd v. Faber,* 565 N.E.2d 584, 588 (Ohio 1991); and *Mt. Zion State Bank & Trust v. Central Illinois Annual Conference of United Methodist Church,* 556 N.E. 2d 1270 (Ill. App. 1990); appeal denied 564 N.E.2d 839.

CONCLUSION

Because the claim is nonactionable, and further secular intrusion into the ecclesiastical governance by a state court will encroach upon, and chill the exercise of, protected First Amendment rights, the District Court should be prohibited from allowing the vicarious liability claim to proceed. "Prohibition will lie to arrest pending proceedings when the remedy of appeal is manifestly inadequate to protect against the chilling effect of a civil action on fundamental political [or religious] freedom, and the litigation to be arrested by prohibition lacks actionable quality." *Gaylord, supra,* at 150.

WHEREFORE, the Petitioner, Oblates of St. Francis de Sales, respectfully requests this Court to assume original jurisdiction, stay this action, and grant the Writ of Prohibition as requested.

Respectfully submitted,

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APPENDIX O

[Filed MAY 23 2000]

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

No. 94744

OBLATES OF ST. FRANCIS de SALES,
an Ohio corporation,

Petitioner,

vs.

THE HONORABLE NILES JACKSON, JUDGE OF
THE DISTRICT COURT OF OKLAHOMA COUNTY,
SEVENTH JUDICIAL DISTRICT,

Respondent,

and

C.J., a minor, by and through his parents and
next of friends, JIMMIE BARTLETT JOHNSON, JR.,
and PAMELA GAYLE JOHNSON, and
JIMMIE BARTLETT JOHNSON, JR.,
and PAMELA GAYLE JOHNSON, individually,

Real Parties in Interest.

APPLICATION TO
ASSUME ORIGINAL JURISDICTION AND
PETITION FOR WRIT OF PROHIBITION

Oblates of St. Francis de Sales, an Ohio Corporation ("Oblates"), pursuant to Article VII, Section 4 of the Oklahoma Constitution and Oklahoma Supreme Court Rules, Rule 1.191 et seq., hereby requests that this Court assume original jurisdiction to issue a Writ of Prohibition against The Honorable Niles Jackson, Judge of the District Court of Oklahoma County, State of Oklahome, Seventh Judicial District and to correct the lower court's erroneous denial of the Petitioner's motions to dismiss.

1. The Supreme Court of the State of Oklahoma is granted power to assume original jurisdiction pursuant to Article VII, Section 4 of the Constitution of the State of Oklahoma in furtherance of its superintending control over all inferior courts and to prevent an inferior court from acting in excess of its judicial authority.

2. The Oblates is one of several defendants in two (2) civil actions currently pending before Respondent, The Honorable Niles Jackson, ("the Respondent Judge") in the District Court of Oklahoma County. The two cases have not been consolidated in the lower court, but because of the identity of issues and parties, have been treated as companion cases. This Petitioner has filed identical Applications seeking prohibition relief in both of the lower court cases. This Application seeks original jurisdiction in the case styled:

C.J., a minor, by and through his parents and next of friends, Jimmie Bartlett Johnson, Jr. and Pamela Gayle Johnson; and Jimmie Bartlett Johnson, Jr., individually; and Pamela Gayle Johnson, individually, Plaintiffs vs. John Doe, Individually; Oblates of St. Francis de Sales; Archdiocese Of Oklahoma City; Reverend Charles A. Salatka;

Reverend Eusebius J. Beltran; and Reverend Alfred J. Russell, Defendants, District Court of Oklahoma County, Case No. CJ-99-6829-65.

3. On January 25, 2000, the Real Parties in Interest filed their Fourth-Amended, and Third-Amended Petitions, respectively, against Petitioners alleging that Dennis Ballard, while still a minor child, and C.J., a minor, were sexually molested by a priest ordained in the Catholic Church and a member of Oblates of St. Francis de Sales. The Real Parties in Interest's claims against the Oblates fall into two categories: (1) a claim for vicarious liability based solely on their allegation that the Oblates employed the priest; and (2) claims for direct liability based on theories of negligent hiring, retention and supervision.

4. On March 23, 2000, the Petitioner moved to dismiss the actions on the ground that the trial court lacked subject matter jurisdiction by virtue of the provisions of the First Amendment of the United States Constitution, and Article I, Section Two of the Oklahoma Constitution. Similar motions to dismiss was filed by Co-Defendents, Archdiocese of Oklahoma City, Reverend Charles A. Salatka, Reverent Eusebius J. Beltran, and Reverend Eusebius J. Beltran.[1]

5. On May 15, 2000, without hearing oral argument, the Respondent Judge issued a memorandum order

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[1] Those co-defendants have also sought to invoke this Court's original jurisdiction on these issues by filing their Application and Brief in Support on May 22, 2000, bearing Case No. 94730. Oral presentation of that proceeding is scheduled for June 20th, 2000, at 10:30 a.m.

overruling all motions to dismiss. (Appendix No. 1)

6. The Respondent Judge wrongfully overruled the motions to dismiss. Unless this Court assumes original jurisdiction and issues a Writ of Prohibition to the lower court, the Respondent Judge will continue to exercise jurisdiction in excess of lawful judicial authority.

7. The Oblates demonstrate in their Brief, submitted contemporaneously with this Application, that original jurisdiction and prohibition is proper for the following reasons:

   i. The Supreme Court should exercise original jurisdiction when constitutional rights require immediate protection;

   ii. Prohibition is proper when matters of public concern are impacted by litigation in the lower court;

   iii. Judicial interference into the Oblates' ecclesiastical relationship with its clergy is barred by constitutional protections;

   iv. The United States Supreme Court has consistently held that governmental entanglement into protected religious activity is barred by the First Amendment;

   v. Traditional tort principals cannot be applied in the case at bar without requiring judicial interpretation of church doctrine and policy;

   vi. Allegations of notice or knowledge do not correct the constitutional infirmities of Plaintiffs' claims; and,

vii. Because the priest's misconduct was outside the scope of his employment, the Oblates cannot be held vicariously liable under the doctrine of *respondeat superior.*

8. Pursuant to the due-process guarantees of the Fourteenth Amendment to the Constitution of the United States and Article II of the Oklahoma Constitution, the Petitioner has the right not to be forced to defend an action in a court that lacks lawful jurisdiction over it.

9. Petitioner has no other timely and effective means of relief available to it. Without the relief requested herein, Petitioner's substantial rights will be impaired, as it will be forced to spend unnecessary resources defending this case through discovery and trial before being permitted to seek relief on the issue of subject matter jurisdiction.

10. Further, allowing this case to proceed to trial could produce the very consequences prohibited by the First Amendment – excessive government entanglement into protected religious activities as well as a chilling effect on the ability of ecclesiastical organizations to govern themselves free from such entanglement.

11. This Application and Petition for Writ of Prohibition is filed more than ten (10) days before any dispositive hearing or trial in the lower court cases. Because the Real Parties in Interest now seek discovery of the Defendants, the Oblates' have filed in the lower court cases a motion to stay those proceedings pending this Court's resolution of the present matter. The hearing on the motion to stay is schedule for June 1, 2000, at 1:30 p.m.

WHEREFORE, Petitioner, Oblates of St. Francis de Sales, respectfully requests this Court to assume original jurisdiction and issue a Writ of Prohibition directing the Respondent Judge to refrain from further proceedings in Case No. CJ-99-6364-65 and Case No. CJ-99-6829-65, pending in the District Court of Oklahoma County, and to dismiss the actions on the grounds that subject matter jurisdiction is barred by the United States and Oklahoma Constitutions.

Petitioner further requests, in the event that the Respondent Judge overrules the pending motion to stay proceedings, that this Court issue an order staying further proceedings in the lower court until the present original jurisdiction issues are resolved.

Respectfully submitted,

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APPENDIX P

[Filed JUL 17 2000]

IN THE DISTRICT COURT
WITHIN AND FOR OKLAHOMA COUNTY
STATE OF OKLAHOMA

– UNDER SEAL –

Case No. CJ-99-6829-65

C.J., a minor, by and through his parents and next of friends, JIMMIE BARTLETT JOHNSON, JR., and PAMELA GAYLE JOHNSON and JIMMIE BARTLETT JOHNSON, JR., individually and PAMELA GAYLE JOHNSON, individually,

Plaintiffs,

vs.

JOHN DOE, individually, OBLATES OF ST. FRANCIS de SALES, THE ARCHDIOCESE OF OKLAHOMA CITY, REVEREND CHARLES A. SALATKA, REVERENT EUSEBIUS J. BELTRAN, and REVEREND ALFRED J. RUSSELL,

Defendants.

SECOND MOTION TO COMPEL
PURSUANT TO 12 O.S. §3237

COME NOW the Plaintiffs, C.J., JIMMIE BARTLETT JOHNSON, JR. and PAMELA GAYLE JOHNSON, and

move this Court to compel Defendants, OBLATES OF ST. FRANCIS de SALES, to cooperate with discovery. In support of said motion, Plaintiffs allege and state:

1. Requests for Production of Documents and Requests for Admissions were served on Defendant Oblates through their attorney on January 10, 2000.

2. On February 8, 2000, Defendant Oblates filed its Motion requesting additional time within which to respond to the discovery requests. The Plaintiffs agreed to an extension of time, and on February 9, 2000, the Court granted an additional 41 days, or until March 24, 2000, within which to answer.

3. Thereafter, on March 21, 2000, Defendant Oblates made a second request for extension of time to respond to the discovery requests. Plaintiffs filed their objections to same.

4. On April 7, 2000, Plaintiffs filed a Motion to Compel and Motion to Deem Requests for Admissions Admitted for Failure to Answer.

5. By Order entered May 18, 2000, the Court granted Defendant Oblates an additional fifteen (15) days from the date of the Order, or until June 2, 2000, to respond to the discovery requests.

6. Thereafter, on May 19, 2000, Defendant Oblates filed a Motion to Stay Proceedings pending resolution of their Application for Original Jurisdiction and Petition for Writ of Prohibition which was subsequently filed with the Supreme Court on May 23, 2000.

7. By Order entered June 1, 2000, this Court granted Defendant Oblates Motion, staying all proceedings until resolution by the Supreme Court of Defendant Oblates' Application to Assume Original Jurisdiction and Petition for Writ of Prohibition.

8. On July 10, 2000, the Supreme Court of the State of Oklahoma entered its Order denying the Application to Assume Original Jurisdiction of Defendant Oblates.

9. To date, Defendant Oblates has not responded to any of the discovery requests.

10. Plaintiffs request this court to order Defendant Oblates to respond to the Plaintiffs' Requests for Admissions and Request for Production of Documents within five (5) days of the Court's order granting the Motion to Compel.

WHEREFORE, Plaintiffs respectfully request an order of this Court compelling Defendant Oblates to respond to the discovery requests, an award of Plaintiffs' reasonable fees incurred in obtaining this order, including attorney fees, and for such other and further relief as this Court may deem just and proper.

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APPENDIX Q

[Filed MAY 23 2000]

No. 94744

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

OBLATES OF ST. FRANCIS de SALES,
an Ohio corporation,

Petitioner,

vs.

THE HONORABLE NILES JACKSON,
JUDGE OF THE DISTRICT COURT OF OKLAHOMA
COUNTY, SEVENTH JUDICIAL DISTRICT,

Respondent,

and

DENNIS BALLARD, individually,
RONALD BALLARD, individually, and
ALGERENE BALLARD, individually,

Real Parties in Interest.

BRIEF IN SUPPORT OF APPLICATION TO
ASSUME ORIGINAL JURISDITION AND
PETITION FOR WRIT OF PROHIBITION

Original Jurisdiction Proceeding Seeking Prohibition -
Oklahoma County District Court, State of Oklahoma,
Case No. CJ-99-6364-65,
The Honorable Niles Jackson Presiding

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BRIEF IN SUPPORT OF APPLICATION TO ASSUME ORIGINAL JURISDICTION AND PETITION FOR WRIT OF PROHIBITION

Petitioner, Oblates of St. Francis de Sales ("Oblates") respectfully requests this Court to assume original jurisdiction and issue a Writ of Prohibition halting further exercise of jurisdiction by the Respondent Judge and the District Court of Oklahoma County ("District Court") and correcting the Respondent Judge's erroneous denial of Petitioner's motions to dismiss.

SUMMARY OF THE RECORD

The Real Parties in Interest, (hereinafter referred to as "Plaintiffs")[1] respectively, filed a Fourth-Amended Petition (App. No. 2) and Third-Amended Petition (App. No. 3) against Petitioner and other co-defendants alleging that Dennis Ballard, while still a minor child, and C.J., a minor, were sexually molested by a priest ordained in the Catholic Church and a member of the religious order, the Oblates of St. Francis de Sales. The Plaintiffs' claims against the Oblates fall into two basic categories: (1) a claim for vicarious liability based solely on Plaintiffs' allegation that the Oblates employed the priest; and (2) claims for direct liability based on theories of negligent hiring, retention and supervision.

Without answering the Plaintiffs' petitions, the Oblates filed motions to dismiss the claims on the grounds that the petitions failed to state a claim upon which relief could be granted and that the District Court lacked subject matter jurisdiction. The Oblates argued that Plaintiffs' claims are barred by the First Amendment to the

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[1] "Plaintiffs," as used herein, refers to the claimants in both cases, CJ-99-6364-65 and CJ-99-6829-65.

United States Constitution and Article I, Section Two of the Oklahoma Constitution, and are not cognizable under the applicable Oklahoma case law. Without hearing oral argument, the Respondent Judge overruled the motions to dismiss by letter memorandum dated May 15, 2000. (App. No. 1).[2] The Petitioner seeks relief from this ruling, which enables the District Court to exercise unlawful jurisdiction in the matters below, and asks this Court to issue a Writ prohibiting further proceedings in the lower court and dismissing the actions filed by the Plaintiffs.

The Plaintiffs continue to seek discovery from the Oblates and the other defendants in the form of both written discovery requests, motions to compel, and demands for depositions. The Petitioner has filed in the lower court a motion to stay further proceedings pending this Court's disposition of the present matter. That motion has been scheduled for hearing before the Respondent Judge on June 1, 2000. Should the Respondent Judge overrule the motion to stay, Petitioner's Application for Original Jurisdiction filed contemporaneously with this Brief contains a request for relief from this Court to stay the proceedings below pending determination of the present matter. Such relief will be sought by emergency application pursuant to Supreme Court Rule 1.15(c)(1).

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[2]Paragraph 1 of the Respondent Judge's letter memorandum sustains the Defendants' Motions to Strike, which were filed as a result of extraneous evidence attached to the Plaintiffs' response to the motions to dismiss. The Defendants objected to tendered materials on the grounds that the issues before the lower court involved matters of law, and matters outside the pleadings were improper for consideration on the motions to dismiss.

ARGUMENT AND AUTHORITIES

I.

THE SUPREME COURT SHOULD EXERCISE ORIGINAL JURISDICTION WHEN CONSTITUTIONAL RIGHTS REQUIRE IMMEDIATE PROTECTION

This Court is expressly granted supervisory power over the lower courts by Article VII, Section 4 of the Oklahoma Constitution in furtherance of its superintending control over all inferior courts and to prevent an inferior court from acting in excess of its judicial authority. Such relief is available during the early stages of litigation when pending proceedings will impact fundamental freedoms or involve matters of broad public concern.

After a District Court's denial of a preliminary dispositive motion, this Court has exercised original cognizance to protect against intrusion into fundamental constitutional rights at stake in the trial-court process. *See Gaylord Entertainment v. Thompson, et al.*, 1998 OK 30, 958 P.2d 128, and *Brock v. Thompson*, 1997 OK 127, 948 P.2d 279. In such cases, the Supreme Court assumes original jurisdiction to prohibit the use of "unauthorized or excessive judicial force in nonactionable claims" and issues a writ of prohibition when First Amendments rights require immediate protection from encroachment by the lower court. *Gaylord Entertainment* at 136. *See also Sabouri v. Hunter*, 1979 OK 95, 596, P.2d 891, and *Powell v. Seay*, 553 P.2d 161 (Okla. 1976).

The District Court in the present case is requiring ecclesiastical organizations to defend themselves in court for the manner in which they govern their clergy. Such secular intrusion into protected religious activity encroaches upon protected fundamental rights and breaches

the separation of church and state. Should the case continue, the threat of burdensome discovery and harassing lawsuits will cause a chilling effect on freedom of religious governance.

An employer's conduct can be scrutinized to determine if the employer has deviated from an accepted standard of care and thereby negligently hired, supervised, or retained an employee. However, the District Court seeks to evaluate the relationship between the priest and the Oblates just as it would any other employer/employee relationship. To evaluate such claims, the District Court would need to fabricate an acceptable standard of care for a religious order and would need to answer many questions of significant religious concern, such as: When are a person's transgressions so unacceptable that a religious order, no matter its belief in the power of God to forgive and mend, must find he cannot be accepted or retained? Does a religious order have the right or authority to "dismiss" a cleric who has validly received sacred ordination? When should the traditional concept of confession and absolution be doubted or denied? The District Court lacks jurisdiction to decide such issues.

Under the clear mandate of the Free Exercise Clause of the First Amendment to the United States Constitution, civil courts cannot determine who can be ordained a priest or who can be an Oblate. Further, the civil courts cannot determine how or who within the hierarchy of a church or religious order must discipline a wayward cleric, or when the church must set aside its traditions of penitence and forgiveness. To preserve the separation between church and state, the civil courts are constitutionally precluded from analyzing the inner workings of religious institutions.

Moreover, the Fourteenth Amendment to the Constitution of the United States and Article II, Section 7 of the Oklahoma Constitution provide the due-process guarantees that the Petitioner has the right not to be forced to defend an action in a court that lacks lawful jurisdiction over it.

II.

PROHIBITION IS PROPER WHEN MATTERS OF PUBLIC CONCERN ARE IMPACTED BY LITIGATION IN THE LOWER COURT

This Court has held that prohibition is also a proper remedy where the lower court is exercising unauthorized judicial power in matters involving public policy and broad public concern. *Davis v. Thompson*, 1986 OK 38, 721 P.2d 789, and *Cannon v. Lane*, 1993 OK 40, 867 P.2d 1235. Plaintiffs' claims necessarily involve a matter of broad public concern – a large number of citizens will be impacted by allowing secular prosection of religious organizations under traditional theories of employment-related tort law.

A case of more broad public concern is difficult to imagine – random triers of fact would be asked to evaluate Catholic traditions of confession, forgiveness, and redemption. Allowing employment-related negligence claims against ecclesiastical organizations is the first step down a slippery slope which could lead to burdensome litigation and inconsistent jury verdicts. Excessive government entanglement and a chilling of fundamental religious practices would result, as unpopular or misunderstood religions could be litigated out of existence in one region, while being subjectively protected in another.

III.

JUDICIAL INTERFERENCE INTO THE OBLATES' ECCLESIASTICAL RELATIONSHIP WITH ITS CLERGY IS BARRED BY CONSTITUTIONAL PROTECTIONS

The Free Exercise Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." This protection preserves religious independence from both judicial and legislative state interference. *Kreshik v. Saint Nicholas Cathedral,* 363 U.S. 190, 191, 80 S.Ct. 1037, 1038 (1960). (Emphasis Added).

Section Two of the First Article of the Oklahoma Constitution states, "Perfect toleration of religious sentiment shall be secured, and no inhabitant of the State shall ever be molested in person or property on account of his or her mode of religious worship, and no religious test shall be required for the exercise of civil or political rights. Polygamous or plural marriages are forever prohibited."

A. The United States Supreme Court Has Consistently Held That Governmental Entanglement Into Protected Religious Activity Is Barred By The First Amendment.

Since its ratification in 1791, the First Amendment has been invoked by the United States Supreme Court to shield and protect religious freedom. Under the Fourteenth Amendment, the protections guaranteed by the First Amendment apply to state, as well as federal, governmental intrusion into protected rights. *Cantwell v. State of Connecticut,* 310 U.S. 296, 60 S.Ct. 900 (1940). "The essential characteristic of these [religious] liberties is, that under their shield many type of life, character, opinion and belief can develop unmolested and unob-

structed." *Id.*, 60 S.Ct. at 906. Government must be neutral in "its relations with groups of believers and non-believers", *Everson v. Board of Education of Ewing TP*, 330 U.S. 1, 18 (1947), and cannot force a person to "profess a belief or disbelief in any religion." *Id.* at 15. Matters of religious controversy and whether church organizations have or have not departed from religious doctrine are purely ecclesiastical matters. *Watson v. Jones*, 80 U.S. [13 Wall.] 679, 20 L.Ed. 666 (1872).

B. Traditional Tort Principals Cannot Be Applied In The Case At Bar Without Requiring Judicial Interpretation Of Church Doctrine And Policy.

The constitutional right of religious organizations to be free from governmental interference as applied to priest-misconduct cases was well-articulated by the Supreme Court of Wisconsin in *Pritzlaff v. Archdiocese of Milwaukee*, 194 N.E.2d 780 (Wis. 1995). There, the alleged sexual misconduct of a priest formed the basis for a parishioner's claim against the church for negligent hiring, retention, training and supervision of its clergy. The court found that the First Amendment prohibited judicial inquiry into the practices of the Archdiocese and held that the plaintiff had filed to state a claim upon which relief could be granted. *Id.* at 789-90.

First, in considering whether a claim for negligent hiring or retention could be pressed, the court stated:

> ". . . But, we conclude that the First Amendment to the United States Constitution prevents the courts of this state from determining what makes one competent to serve as a Catholic priest since such a determination would require interpretation of church canons and internal church policies and

practices. Therefore, [plaintiff's] claim is not capable of enforcement by the courts." (Emphasis Added).

The rationale for this rule was recently aptly summarized by a pair of commentators as follows:

> Examining the ministerial selection policy, which is 'infused with the religious tenets of the particular sect,' entangles the court in qualitative evaluation of religious norms. Negligence requires the court to create a 'reasonable bishop' norm. Beliefs in penance, admonition and reconciliation as a sacramental response to sin may be the point of attack by a challenger who wants a court to probe the tort-law reasonableness of the church's mercy toward the offender . . . . The tort of negligent selection of unsuitable teachers has been recognized in civil courts. If negligent selection of a potential pedophile for the religious office of a priest, minister or rabbi is a tort as to future child victims, will civil courts also hear Title VII challenges by the non-selected seminarian against the theological seminary that declines to ordain a plaintiff into ministry because of his psychological profile? How far shall the courts' qualitative entanglement with religious selectivity extend? (Emphasis Added).

Id. at 790 (quoting James T. O'Reilly & Joann M. Strasser, *Clergy Sexual Misconduct: Confronting the Difficult Constitutional and Institutional Liability Issues*, 7 St. Thomas L. Rev. 31 (1994)) (App. No. 4).

Next, the *Pritzlaff* court discussed whether a claim could be pressed for the supervision and training of clergy:

> [S]tate inquiry into the training and supervision of clergy . . . is nonetheless prohibited by the

First Amendment under most if not all circumstances. As one court stated in refusing to allow a claim for negligent supervision:

> [A]ny inquiry into the policies and practices of the church defendants in hiring or supervising their clergy raises the same kinds of First Amendment problems of entanglement discussed above, which might involve the court in making sensitive judgments about the propriety of the church Defendants' supervision in light of their religious beliefs . . . **The traditional denominations each have their own intricate principles of governance, as to which the state has no right of visitation.** Church governance is founded in scripture, modified by reformers over almost two millenia. (Emphasis Added).

Id. at 791 (quoting *Schmidt v. Bishop*, 779 F.Supp. 321, 332 (S.D.N.Y. 1991)).[3]

The Wisconsin court reaffirmed its holding in *Pritzlaff* and described the constitutional barriers which prevent state judicial review of ecclesiastical relationships in the Roman Catholic church in *L.L.N. v. Clauder*, 209 Wis.2d 674, 563 N.W.2d 434, (Wis. 1997). The court stated:

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[3]The *Schmidt* court concludes its opinion with an important statement:

> "It would therefore also be inappropriate and unconstitutional for this Court to determine after the fact that the ecclesiastical authorities negligently supervised or retained the defendant Bishop. Any aware of damages would have a chilling effect leading indirectly to state control over the future conduct of affairs of a religious denomination, a result violative of the text and history of the establishment clause." (Emphasis Added) 779 F.Supp. at 331.

[O'Reilly and Strasser] further elaborate on the reasons why "the measurement of duty and reasonableness needed to find negligence will inevitably entangle the civil court in the nuances of religious discipline practices." (Emphasis Added). For example, O'Reilly and Strasser state that the Roman Catholic Church has internal disciplinary procedures that are influenced by a religious belief in reconciliation and mercy. They explain:

> The reconciliation and counseling of the errant clergy person involves more than a civil employer's file reprimand or three day suspension without pay for misconduct. Mercy and forgiveness of sin may be concepts familiar to bankers but they have no place in the discipline of bank tellers. For clergy, they are interwoven in the institution's norms and practices. (Emphasis Added).

Therefore, due to this strong belief in the redemption, a bishop may determine that a wayward priest can be sufficiently reprimanded through counseling and prayer. If a court was asked to review such conduct to determine whether the bishop should have taken some other action, the court would directly entangle itself in the religious doctrines of faith, responsibility, and obedience. (Emphasis Added).

Likewise, O'Reilly and Strasser explain that negligent supervision claims would require a court to formulate a "reasonable cleric" standard, which would vary depending on the cleric involved, i.e., reasonable Presbyterian pastor standard, reasonable Catholic archbishop standard, and so on. Such individualized standards would be required because, as previously mentioned, church doctrines and practices are intertwined with the supervision and discipline of clergy. However, as O'Reilly and

> Strasser state: "Our pluralistic society dislikes having its neutral jurists place themselves in the role of a 'reasonable chief rabbi,' 'reasonable bishop,' etc., because of the degree of involvement that must accompany such decisional framework for the civil tort judge." This further explains why this court held that negligent supervision claims are "prohibited by the First Amendment under most if not all circumstances." (Emphasis Added).

L.L.N. v. Clauder, 209 Wis.2d at 689-91 (quoting O'Reilly v. Strasser, *supra*)

In *Swanson v. Roman Catholic Bishop of Portland*, 692 A.2d 441 (Me. 1997), the court considered the issue of whether tort liability could be imposed against the church for negligent supervision of a priest. The court held that the plaintiffs' claim was barred by constitutional principles. *Id.* at 444. The *Swanson* court stated:

> When a civil court undertakes to compare the relationship between a religious institution and its clergy with the agency relationship of the business world, secular duties are necessarily introduced into the ecclesiastical relationship and the risk of constitutional violation is evident. (Emphasis Added).

Id. The court reasoned that the principles involved in the plaintiffs' claim required an examination of religious law and usage regarding the church's authority over the priest. The court noted the important point that canon law severely restricted the ability of the church to remove, transfer and supervise the priest, and found that the First Amendment precluded an inquiry into the allocation of power within a heirarchical church. *Id.*

Moreover, while acknowledging that some other courts had allowed negligent supervision claims against churches if the facts required no interpretation of church doctrine, the *Swanson* court found that an inquiry into the eccles-

iastical relationship between the priest and the Catholic Church was unconstitutional:

> **The imposition of secular duties and liability on the church as a "principal" will infringe upon its right to determine the standards governing the the relationship between the church, its bishop, and the parish priest. (Emphasis Added).**

Id. at 444-45.

The court also rejected those cases where the claim was allowed to proceed if the defendant had allegedly received notice that an individual clergyman was potentially dangerous. The court concluded that imposing a secular duty of supervision on the church would restrict the church's freedom to adhere to its ecclesiastical procedures. *Id.* at 445.

The Oklahoma Supreme Court has not ruled on the issue of whether the First Amendment precludes claims for employment-related liability against an ecclesiastical religious institution. *N.H. v. Presbyterian Church (U.S.A.)*, 1999 OK 88, ¶ 26 (First Amendment analysis unnecessary in case involving pastoral sexual misconduct because underlying facts supported no employment-related liability against church); *Bladen v. First Presbyterian Church*, 857 P.2d 789, 797 (Okla. 1993) (Because plaintiffs' claims against minister were not cognizable, employment-related claims against church were not viable and First Amendment analysis was not reached).[4]

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[4]However, in *N.H v. Presbyterian Church, supra*, the Honorable Nancy Coats of the Seventh Judicial District of the State of Oklahoma granted summary judgment on the grounds that the plaintiff's claims against the church were barred by the First Amendment. On appeal, the Supreme Court affirmed the trial

[footnote continued]

However, the Oklahoma Supreme Court has held that the First Amendment prohibits the government from imposing its own ideas on the religious organization. *Guinn v. Church of Christ of Collinsville, supra,* 775 P.2d 766, 772 (Okla. 1989) (under the First Amendment people may freely consent to being spiritually governed by an established set of ecclesiastical tenets defined and carried out by those chosen to interpret and impose them.)

In order to exercise jurisdiction in the present matter, the District Court must pass judgment upon the policies and practices of the Oblates and its internal organization. However, the cases discussed herein repeatedly acknowledged the central fact that the ***governance of clergy within the Catholic religion is controlled by fundamental religious beliefs and church doctrine.*** Application of traditional tort principles of agency and employment-related liability in the present case would result in excessive entanglement between church and state. Such judicial scrutiny would inhibit religious freedom, and would ultimately result in state endorsement of one approved method of religious organization over another. The Free Exercise Clause of the First Amendment prohibits a state civil court from adjudicating the matters set forth in the present case.

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court's dismissal of the plaintiff's case on other grounds. (*See* discussion of *respondeat superior, infra.*) Nonetheless, Judge Coats was obviously persuaded by the constitutional argument, and granted summary judgment in favor of the defendant on all claims and causes of action.

IV. ALLEGATIONS OF NOTICE OR KNOWLEDGE DO NOT CORRECT THE CONSTITUTIONAL INFIRMITIES OF PLAINTIFFS' CLAIM

In paragraph 2 of the lower court's letter order (App. No. 1), the Respondent Judge denied Petitioner's motions to dismiss by stating, "*N.H. v. Presbyterian Church*, 1999 OK 88, at section B of the opinion, clearly allows an employer to be sued if proper knowledge is alleged, as it is alleged in this case." However, this general statement of employment law fails to address the very issues which were before the lower court in the motions to dismiss in this case. The fundamental question is not whether an the Plaintiffs have pled a prima facie employment-law claim, but whether such general standards can constitutionally be applied to the inner workings of religious institutions.

Considerations of knowledge and notice were not mentioned in the portion of the *N.H. v. Presbyterian Church* opinion analyzing *respondeat superior* – those factors were discussed only in the sections of the opinion dealing with negligent hiring, retention and supervision. The *N.H. v. Presbyterian Church* opinion simply holds that, as a matter of general employment law, a claim against an ecclesiastical organization for negligent hiring, supervision, and retention will not lie if the organization had no knowledge of its employee's propensity to commit the harm. *Id.* at ¶ 19-20. A constitutional analysis was therefore unnecessary, and this Court expressly declined to address the First Amendment issue of allowing such claims to be asserted against an ecclesiastical organization. *Id.* at ¶ 26.

The Plaintiffs' allegations of knowledge and notice make no impact upon the constitutional barrier which removes this case from the subject matter jurisdiction

of the District Court. This principle is established in *Ayon v. Gourley*, 47 F.Supp.2d 1246 (Colo. Dist. Ct. 1998). There, the Archdiocese was sued for damages arising from sexual abuse by a priest. The plaintiff alleged that the Archdiocese had prior notice of the priest's propensities, and therefore asserted a claim for negligent hiring and supervision, as well as a claim for outrageous conduct. The court found that dismissal of the petition would be proper because a consideration of *any of the claims* against the Archdiocese would be unconstitutional. *Id.* at 1251. The court specifically stated that the outrageous conduct claim, where the plaintiff claimed that church defendants acted with knowledge, could not open the door for judicial scrutiny of church procedures:

> [T]he analysis of this claim for First Amendment purposes would appear to be very similar to that for the negligent supervision claim. The difference, of course, is the intentional nature of the act. This difference does not change the fact that it is the Archdiocese Defendants' oversight riles with regard to [the priest] that would have to be considered to determine if their conduct was appropriate. Whether examined for negligence or intent, it is the Archdiocese Defendants' actions in supervising [the priest] which would be at issue for both claims.
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> * * *
>
> The court finds that the result is the same for the negligent supervision and outrageous conduct claims. . . . [T]he procedures that the Archdiocese Defendants have in place regarding supervision would have to be examined to determine whether they were reasonable and adequate. This would clearly be inappropriate governmental involvement and a burden on these Defendants' exercise of

> religion. Consequently, Plaintiff's claims against the Archdiocese Defendants must be dismissed as violative of the First Amendment. (Emphasis Added)

Similarly, in *Swanson v. Roman Catholic Bishop of Portland, supra,* 692 A.2d 441, the court rejected the position that a claim could proceed if the defending church had knowledge that an individual clergyman was potentially dangerous:

> We conclude, however, that these few courts have failed to maintain the appropriate degree of neutrality required by the United States and Maine Constitutions. Although "[t]he Supreme Court has consistently recognized that the religion clauses are subject to a balancing of interests test," the Court "has also concluded that certain civil rights protected in secular settings are not sufficiently compelling to overcome certain religious interests." We conclude that, on the facts of this case, imposing a secular duty of supervision on the church and enforcing that duty through civil liability would restrict its freedom to interact with its clergy in the manner deemed proper by ecclesiastical authorities and would not serve a societal interest sufficient to overcome the religious freedoms inhibited. (Emphasis Added).

Id. at 445 (citing *Minker v. Baltimore Annual Conference of United Methodist Church,* 894 F.2d 1354 (D.C. Cir. 1990)).

The District Court seeks to evaluate the knowledge and conduct of the Oblates and determine whether the church should, in some situations, abandon its traditional norms regarding the selection of clergy. However, a civil court or jury is not permitted to discard an established ecclesiastical policy and impose its own judgment

about what is appropriate. Even when faced with emotional issues such as sexual misconduct, the District Court is constitutionally prohibited from reviewing and ruling upon clerical governance. Whether or not the Plaintiffs allege prior knowledge in their petition, the basic fact remains that religious belief and doctrinal policy control the manner in which a priest is called and allowed to serve.

Even the mere argument that the church defendants' knowledge and subsequent actions somehow qualify the case for judicial scrutiny requires an unconstitutional interpretation of religious ideology.[5] The state will be dictating the point at which the church should set aside its doctrine and mold its behavior to comply with common-law tort principles. Every judge and juror in the land will have a different opinion about this issue.

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[5] Even at seemingly surface-level analysis, governmental interpretation of religious policy has been avoided by the courts as excessive entanglements. In *Lemon v. Kurtzman*, 403 U.S. 602, 619-620, 91 S.Ct. 2105, 2114-15 (1971), the Court reviewed the system used to determine whether a religious school could receive state financial aid where the state was required to determine the amount per-pupil sent by the school on secular education versus religious activity:

> "This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches. The Court noted 'the hazards of government supporting churches' in *Walz v. Tax Commission*, 397 U.S., at 675, 90 S.Ct., at 1414, and we cannot ignore here the danger that pervasive modern governmental power will ultimately intrude on religion and thus conflict with the Religion Clauses." *Lemon v. Kurtzman*, 403 U.S. 602, 619-620, 91 S.Ct. 2105 (1971) (Emphasis Added).

Every jurisdiction will apply a different standard of conduct. Some religious systems will "pass the test" and some will not – most likely to the great detriment of unpopular or alternative religions.

In order for employment-related tort law to be equitably applied in our judicial system, rational and consistent rules must be promulgated. Jury instructions regarding reasonableness, duty, causation, and forseeability must be arcitulated so that they can be understood and applied. It would be impossible for our civil courts to create useable guidelines regarding the multi tude of religious beliefs in our society without breaching the separation of church and state. This Court is faced with the emotional issue of sexual misconduct by a priest. Nonetheless, imposing employment-related tort liability against the church defendants for the priest's conduct is barred by the Constitution.

V. BECAUSE THE PRIEST'S MISCONDUCT WAS OUTSIDE THE SCOPE OF HIS EMPLOYMENT, THE OBLATES CANNOT BE HELD VICARIOUSLY LIABLE UNDER THE DOCTRINE OF *RESPONDEAT SUPERIOR.*

The District Court should be prohibited from allowing any claim against the Petitioner to proceed under the doctrine of *respondeat superior.* As a matter of law, a church or religious order is not vicariously liable for a cleric's molestation of a minor – such conduct falls outside the scope of anyone's employment. The Oklahoma Supreme Court has addressed this very issue and has ruled as a matter of law that a church is not vicariously liable for the sexual conduct of a priest or minister. This rule is clearly set forth in *N.H. v. Presbyterian Church (U.S.A.)*, 1999 OK 88.

In *N.H. v. Presbyterian Church,* minor plaintiffs who had been molested by a minister sought to impose liability upon the Presbyterian Church under the doctrine of *respondeat superior.* Ths Oklahoma Supreme Court unequivocally held that vicariously liability under that doctrine could not be imposed upon a church for its minister's sexual misconduct. *Id.* at ¶14-18. The court also rejected the argument that ratification allowed vicarious liability, reasoning that no benefits were derived or accepted by the church as a result of the minister's tortious conduct. *Id.* at note 32.

Oklahoma's rule of law is consistent with the holdings of courts across the country that have faced this very issue. See, e.g., *Tichenor v. Roman Catholic Church of Archdiocese of New Orleans,* 32 F.3d 953, 960 (5th Cir. La. 1994); *Rita M. v. Roman Catholic Archbishop of Los Angeles,* 187 Cal.App.3d 1453, 1461 (1986); *Byrd v. Faber,* 565 N.E.2d 584, 588 (Ohio 1991); and *Mt. Zion State Bank & Trust v. Central Illinois Annual Conference of United Methodist Church,* 556 N.E. 2d 1270 (Ill. App. 1990); appeal denied 564 N.E.2d 839.

CONCLUSION

Because the claim is nonactionable, and further secular intrusion into the ecclesiastical governance by a state court will encroach upon, and chill the exercise of, protected First Amendment rights, the District Court should be prohibited from allowing the vicarious liability claim to proceed. "Prohibition will lie to arrest pending proceedings when the remedy of appeal is manifestly inadequate to protect against the chilling effect of a civil action on fundamental political [or religious] freedom, and the litigation to be arrested by prohibition lacks actionable quality." *Gaylord, supra,* at 150.

WHEREFORE, the Petitioner, Oblates of St. Francis de Sales, respectfully requests this Court to assume original jurisdiction, stay this action, and grant the Writ of Prohibition as requested.

Respectfully submitted,

/s/ David C. Johnston, Jr.
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ATTORNEYS FOR
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APPENDIX R

[Filed JUL 17 2000]

IN THE DISTRICT COURT
WITHIN AND FOR OKLAHOMA COUNTY
STATE OF OKLAHOMA

UNDER SEAL

Case No. CJ-99-6829-65

C.J., a minor, by and through his parents
and next of friends, JIMMIE BARTLETT
JOHNSON, JR., and PANELA GAYLE JOHNSON
and JIMMIE BARTLETT JOHNSON, JR.,
individually and
PAMELA GAYLE JOHNSON, individually,

Plaintiffs,

vs.

JOHN DOE, individually,
OBLATES OF ST. FRANCIS de SALES,
THE ARCHDIOCESE OF OKLAHOMA CITY,
REVERENT CHARLES A. SALATKA,
REVEREND EUSEBIUS J. BELTRAN, and
REVEREND ALFRED J. RUSSELL,

Defendants.

SECOND MOTION TO COMPEL
PURSUANT TO 12 O.S. § 3237

COME NOW the Plaintiffs, C.J., JIMMIE BARTLETT JOHNSON, JR. and PAMELA GAYLE JOHNSON, and move this Court to compel Defendants, OBLATES OF ST. FRANCIS de SALES, to cooperate with discovery. In support of said motion, Plaintiffs allege and state:

1. Requests for Production of Documents and Requests for Admissions were served on Defendant Oblates through their attorney on January 10, 2000.

2. On February 8, 2000, Defendant Oblates filed its Motion requesting additional time within which to respond to the discovery requests. The Plaintiffs agreed to an extension of time, and on February 9, 2000, the Court granted an additional 41 days, or until March 24, 2000, within which to answer..

3. Thereafter, on March 21, 2000, Defendant Oblates made a second request for extension of time to respond to the discovery requests. Plaintiffs filed their objections to same.

4. On April 7, 2000, Plaintiffs filed a Motion to Compel and Motion to Deem Requests for Admissions Admitted for Failure to Answer.

5. By Order entered May 18, 2000, the Court granted Defendant Oblates an additional fifteen (15) days from the date of the Order, or until June 2, 2000, to respond to the discovery requests.

6. Thereafter, on May 19, 2000, Defendant Oblates filed a Motion to Stay Proceedings pending resolution of their Application for Original Jurisdiction and Petition for Writ of Prohibition which was subsequently filed with the Supreme Court on May 23, 2000.

7. By Order entered June 1, 2000, this Court granted Defendant Oblates Motion, staying all proceedings until resolution by the Supreme Court of Defendant Oblates'

Application to Assume Original Jurisdiction and Petition for Writ of Prohibition.

8. On July 10, 2000, the Supreme Court of the State of Oklahoma entered its Order denying the Application to Assume Original Jurisdiction of Defendant Oblates.

9. To date, Defendant Oblates has not responded to any of the discovery requests.

10. Plaintiffs request this Court to order Defendant Oblates to respond to the Plaintiffs' Requests for Admissions and Requests for Production of Documents within five (5) days of the Court's order granting the Motion to Compel.

WHEREFORE, Plaintiffs respectfully request an order of this Court compelling Defendant Oblates to respond to the discovery requests, an award of Plaintiffs' reasonable fees incurred in obtaining this order, including attorney fees, and for such other and further relief as this Court may deem just and proper.

STUART, FRIEDA & HAMMOND, P.C.

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- and -

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ATTORNEYS FOR PLAINTIFFS

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APPENDIX S

[Filed JUL 17 2000]

IN THE DISTRICT COURT
WITHIN AND FOR OKLAHOMA COUNTY
STATE OF OKLAHOMA

– UNDER SEAL –

Case No. CJ-99-6829-65

C.J., a minor, by and through his parents and next of friends, JIMMIE BARTLETT JOHNSON, JR., and PANELA GAYLE JOHNSON and JIMMIE BARTLETT JOHNSON, JR., individually and PAMELA GAYLE JOHNSON, individually,

Plaintiffs,

vs.

JOHN DOE, individually, OBLATES OF ST. FRANCIS de SALES, THE ARCHDIOCESE OF OKLAHOMA CITY, REVEREND CHARLES A. SALATKA, REVEREND EUSEBIUS J. BELTRAN, and REVEREND ALFRED J. RUSSELL,

Defendants.

MOTION TO COMPEL PURSUANT TO 12 O.S. §3237

COME NOW the Plaintiffs, C.J., JIMMIE BARTLETT JOHNSON, JR. and PAMELA GAYLE JOHNSON, and move this Court to compel Defendants, ARCHDIOCESE OF OKLAHOMA CITY, to cooprate with discov-

ery. In support of said motion, Plaintiffs allege and state:

1. Requests for Production of Documents and Requests for Admissions were served on said defendant on or about April 10, 2000;

2. Parties agreed between counsel to extend any answer or response date until the Court ruled upon the Defendant's Motion to Dismiss;

3. That on May 15, 2000, the Court overruled the Defendant's Motion to Dismiss;

4. Thereafter, on May 19, 2000, Defendant filed a Motion to Stay Proceedings pending resolution of its Application for Original Jurisdiction and Petition for Writ of Prohibition which was subsequently filed with the Supreme Court;

5. By Order entered June 1, 2000, this Court granted Defendant's Motion staying all proceedings until resolution by the Supreme Court of Defendant's Application to Assume Original Jurisdiction and Petition for Writ of Prohibition;

6. On July 10, 2000, the Supreme Court of the State of Oklahoma entered its Order denying the Application to Assume Original Jurisdiction of Defendant Archdiocese;

7. Defendant Archdiocese has not responded to any of the discovery requests;

8. Plaintiffs request this Court to order Defendant Archdiocese to respond to the Plaintiffs' Requests for Production of Documents within five (5) days of the Court's order granting the Motion to Compel.

WHEREFORE, Plaintiffs respectfully request an order of this Court compelling Defendant Archdioceses to

respond to the discovery requests, an award of Plaintiffs' reasonable fees incurred in obtaining this order, including attorney fees, and for such other and further relief as this Court may deem just and proper.

STUART, FRIEDA & HAMMOND, P.C.

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ATTORNEYS FOR PLAINTIFFS

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APPENDIX T

[Filed JUL 21 2000]

IN THE DISTRICT COURT
WITHIN AND FOR OKLAHOMA COUNTY,
STATE OF OKLAHOMA

UNDER SEAL

Case No. CJ-99-6829-65

C.J., a minor, by and through his parents and next of friends, JIMMIE BARTLETT JOHNSON, JR., and PAMELA GAYLE JOHNSON and JIMMIE BARTLETT JOHNSON, JR., individually and PAMELA GAYLE JOHNSON, individually,

Plaintiffs,

vs.

JOHN DOE, individually,
OBLATES OF ST. FRANCIS de SALES,
THE ARCHDIOCESE OF OKLAHOMA CITY,
REVEREND CHARLES A. SALATKA,
REVEREND EUSEBIUS J. BELTRAN, and
REVEREND ALFRED J. RUSSELL,

Defendants.

ORDER SETTING HEARING

NOW on this 21st day of July, 2000, the Motion to Compel and Second Motion to Compel filed herein by the Plaintiffs on July 17, 2000, come on before me, the

undersigned Judge. And the Court, being fully advised in the premises, finds that said Motions should be set for hearing.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff's Motion to Compel and Second Motion to Compel filed herein on July 17, 2000, be, and they are hereby set for hearing on the 22nd day of August, 2000, at 1:30 o'clock ____m.

/s/ Bryan C. Dixon
JUDGE OF THE DISTRICT COURT
OKLAHOMA COUNTY, OKLAHOMA

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APPENDIX U

CODE OF CANON LAW

LATIN – ENGLISH EDITION

Translation prepared under the auspices of the
Canon Law Society of America

Canon Law Society of America
Washington, D.C. 20064

* * *

CHAPTER II
BISHOPS

ART. I
BISHOPS IN GENERAL

Can. 375 §1. Through the Holy Spirit who has been given to them, bishops are the successors of the apostles by divine institution; they are constituted pastors within the Church so that they are teachers of doctrine, priests of sacred worship and ministers of governance.

§2. By the fact of their episcopal consecration bishops receive along with the function of sanctifying also the functions of teaching and of ruling, which by their very nature, however, can be exercised only when they are in hierarchical communion with the head of the college and its members.

Can. 376 Bishops are called *diocesan* when the care of a diocese has been entrusted to them; all others are called *titular*.

Can. 377 §1. The Supreme Pontiff freely appoints bishops or confirms those who have been legitimately elected.

§2. At least every three years the bishops of an ecclesiastical province or, if circumstances suggest this, the bishops of a conference of bishops are to compose in common counsel and in secret a list of presbyters, including members of institutes of consecreated life, who are suitable for the episcopacy and send it to the Apostolic See; each bishop retains the right to make known to the Apostolic See on his own the names of presbyters whom he thinks worthy and suitable for the episcopal office.

§3. Unless other provisions have legitimately been made, whenever a diocesan bishop or a coadjutor bishop is to be named, in regard to the *ternus*, as it is called, to be proposed to the Apostolic See it is the responsibility of the pontifical legate to seek out individually the suggestions of the metropolitan and the suffragans of the province to which the diocese to be provided belongs or with which it is joined and of the president of the conference of bishops and to communicate them to the Apostolic See together his own preference; moreover, the pontifical legate is to hear some members of the college of consultors and of the cathedral chapter, and if he judges it expedient, he shall also obtain individually and in secret, the opinion of other members of the secular and religious clergy as well as of the laity who are outstanding for their wisdom.

§4. Unless other provisions have been legitimately made, a diocesan bishop who judges that an auxiliary bishop ought to be given to his diocese is to propose to the Apostolic See a list of at least three priests who are quite suitable for this office.

* * *

Can. 521 §1. To assume the office of pastor validly one must be in the sacred order of the presbyterate.

§2. He should also be distinguished for his sound doctrine and integrity of morals and endowed with a zeal for souls and other virtues; he should also possess those qualities which are required by universal and particular law to care for the parish in question.

§3. For the office of pastor to be conferred on someone, it is necessary that his suitability be clearly evident by means of some method determined by the diocesan bishop, even by means of an examination.

Can. 522 The pastor ought to possess stability in office and therefore he is to be named for an indefinite period of time; the diocesan bishop can name him for a certain period of time only if a decree of the conference of bishops has permitted this.

Can. 523 With due regard for the prescription of can. 682, the diocesas bishop is the person competent to provide for the office of pastor by means of free conferral unless someone possesses the right of presentation or of election.

Can. 524 After he has weighed all the circumstances, the diocesan bishop is to confer a vacant parish on the person whom he judges suited to fulfill its parochial care without any partiality; in order to make a judgment concerning a person's suitability he is to listen to the vicar forane, conduct appropriate investigations and, if it is warranted, listen to certain presbyters and lay members of the Christian faithful.

Can. 525 When a see is vacant or impeded the diocesan administrator or another person who is ruling the diocese in the meantime is competent:

1° to install or confirm presbyters who have been legitimately presented or elected for a parish;

2° to appoint pastors if the see has been vacant or impeded for a year.

Can. 526 §1. A pastor is to have the parochial care of only one parish; however the care of several neighboring parishes can be entrusted to the same pastor due to a dearth of priests or in other circumstances.

§2. In the same parish there is to be only one pastor or one moderator in accord with can. 517, §1; any custom contrary to this is reprobated and any privilege contrary to this is revoked.

Can. 527 §1. The person who has been promoted to carry out the pastoral care of a parish acquires that care and is bound to exercise it from the moment he takes possession of the parish.

* * *

APPENDIX V

CATECHISM OF THE CATHOLIC CHURCH

* * *

The sanctifying office

893 The bishop is "the steward of the grace of the supreme priesthood,"[423] especially in the Eucharist which he offers personally or whose offering he assures through the priests, his co-workers. The Eucharist is the center of the life of the particular Church. The bishop and priests sanctify the Church by their prayer and work, by their ministry of the word and of the sacraments. They sanctify her by their example, "not as domineering over those in your charge but being examples to the flock."[424] Thus, "together with the flock entrusted to them, they may attain to eternal life."[425]

The governing office

894 "The bishops, as vicars and legates of Christ, govern the particular Churches assigned to them by their counsels, exhortations, and example, but over and above that also by the authority and sacred power" which indeed they ought to exercise so as to edify, in the spirit of service which is that of their Master.[426]

895 "The power which they exercise personally in the name of Christ, is proper, ordinary, and immediate, although its exercise it ultimately controled by the supreme authority of the Church."[427] But the bishops should not be thought of as vicars of the Pope. His ordinary and immediate authority over the whole Church

does not annul, but on the contrary confirms and defends that of the bishops. Their authority must be exercised in communion with the whole Church under the guidance of the Pope.

896 The Good Shepherd ought to be the model and "form" of the bishop's pastoral office. Conscious of his own weaknesses, "the bishop . . . can have compassion for those who are ignorant and erring. He should not refuse to listen to his subjects whose welfare he promotes as of his very own children . . . . The faithful . . . should be closely attached to the bishop as the Church is to Jesus Christ, and as Jesus Christ is to the Father":[428]

> Let all follow the bishop, as Jesus Christ follows his Father, and the college of presbyters as the apostles; respect the deacons as you do God's law. Let no one do anything concerning the Church in separation from the bishop.[429]

* * *

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[423] *LG* 26.

[424] *1 Pet* 5:3.

[425] *LG* 26 §3.

[426] *LG* 27; cf. *Lk* 22:26-27.

[427] *LG* 27.

[428] *LG* 27 §2.

[429] St. Ignatius of Antioch, *Ad Smyrn.* 8, 1: *Apostolic Fathers*, II/2, 309.